TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 166.

THE NATIONAL SECURITY BANK, PLAINTIFF IN ERROR,

vs.

PETER BUTLER, RECEIVER OF THE PACIFIC NATIONAL BANK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED OCTOBER 20, 1885.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, JULY 11, 1888.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the district of Massachusetts, Greeting:

[Seal of the Circuit Court, Massachusetts.]

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, between the National Security Bank, a banking association and corporation duly established by the laws of the United States and located and doing business at Boston, in the district of Massachusetts, plaintiffs in error, and Linus M. Price, of Boston, in said district, receiver of the Pacific National Bank, a corporation duly established under the banking laws of the United States and located at Boston aforesaid, defendant in error, in an action of contract, a manifest error hath happened, to the great damage of the said National Security Bank, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the twenty-seventh day of January, in the year of our Lord one thousand eight hundred and eighty-five.

JOHN G. STETSON,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by—
LE BARON B. COLT,
Circuit Judge.

2 DISTRICT OF MASSACHUSETTS, *ss:*

Circuit Court of the United States.

And now, here, the judges of the circuit court of the United States in and for the district of Massachusetts make return of this writ by annexing hereto and sending herewith, under the seal of the said circuit court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof I, John G. Stetson, clerk of said circuit court of the United States in and for the district of Massachusetts, have

hereto set my hand and the seal of said court this eighth day of September, A. D. 1885.

[Seal of the Circuit Court, Massachusetts.]

JOHN G. STETSON, *Clerk.*

3 UNITED STATES OF AMERICA, *Massachusetts District,* } *ss:*

At a circuit court of the United States for the first circuit, begun and holden at Boston, within and for the district of Massachusetts, on Wednesday, the fifteenth day of October, in the year of our Lord one thousand eight hundred and eighty-four, before the Honorable Le Baron B. Colt, circuit judge.

THE NATIONAL SECURITY BANK, Defendant, Plaintiff, in Error,
v.
LINUS M. PRICE, Receiver, Plaintiff, Defendant in Error. } In Equity.

The writ of error to the district court of the United States for this district in this cause is in the words following, namely:

4 & 5 UNITED STATES OF AMERICA, *ss:*

[L. S.] The President of the United States to the honorable the judges of the circuit court of the United States for the district of Massachusetts, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court before you, between Linus M. Price, of Boston, in said district, receiver of the Pacific National Bank, a corporation duly established under the banking laws of the United States and located at Boston aforesaid, plaintiff, and the National Security Bank, a banking association and corporation duly established by the laws of the United States and located and doing business in said Boston, defendant, in an action of contract, a manifest error hath happened, to the great damage of the said defendant, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the circuit court of the United States, together with this writ, so that you have the same, on the fifteenth day of October next, before the said circuit court at Boston, that, the record and proceedings aforesaid being inspected, the said circuit court may cause further to be done herein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the

said Supreme Court, the twenty-third day of July, in the year of our Lord one thousand eight hundred and eighty-four.

ALEXANDER H. TROWBRIDGE,
Deputy Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by—

THOMAS L. NELSON,
U. S. District Judge.

6 The return of said district court on said writ of error is as follows:

DISTRICT OF MASSACHUSETTS, *ss:*

District Court of the United States.

And now, here, the judge of the district court of the United States in and for the district of Massachusetts make- return of this writ by annexing hereto and sending herewith, under the seal of the said circuit court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the circuit of the United States, as within commanded.

In testimony whereof I, Elisha Bassett, clerk of said district court of the United States in and for the district of Massachusetts, have hereto set my hand and the seal of said court this thirty-first day of July, A. D. 1884.

[L. S.] ELISHA BASSETT,
Deputy Clerk.

7 *Transcript of Record of District Court.*

(Annexed to and returned with writ of error dated July 23, 1884, and returnable at the October term of the circuit court, A. D. 1884, the certificate to the return of the district court being dated July 31, 1884.)

UNITED STATES OF AMERICA, *Massachusetts District,* } *ss:*

At the district court of the United States begun and holden at Boston, within and for the district of Massachusetts, on the third Tuesday (being the eighteenth day) of March, in the year of our Lord one thousand eight hundred and eighty-four, before the honorable Thomas L. Nelson, judge.

LINUS M. PRICE, of Boston, in the district of Massachusetts, as he is the receiver, duly appointed, of the Pacific National Bank, a corporation duly established under the banking laws of the United States and located in Boston aforesaid, Plaintiff,

v.

THE NATIONAL SECURITY BANK, a banking association and corporation duly established by the laws of the United States and located and doing business in Boston, in said district, defendant, in an action of contract.

8 *Declaration.*

First count. The plaintiff says he is the receiver of the Pacific National Bank of Boston, duly appointed by the Comptroller of the Currency and acting as such receiver; that said bank was a banking association and corporation duly established and organized under the banking laws of the United States, and on or about May 22, 1882, had in its possession certain checks on other banks, a list whereof being hereto annexed, marked "A," and a deposit of money to its credit in defendant bank, amounting in all to $11,008.20, all of which checks and deposit was then owing to said Pacific National Bank; that said bank had, prior thereto, committed an act of insolvency and was then in contemplation of insolvency; that on said May 22, 1882, said Pacific National Bank transferred to and deposited with defendant bank all said checks and transferred to defendant said deposit of money, and defendant thereafter collected all said checks, receiving the money therefor; that said transfers were all made with a view to prevent the application of the assets of said Pacific National Bank in the way and manner prescribed by the National Bank Act of the United States, and with a view to the preference of one creditor over another, and were utterly null and void; and plaintiff says defendant is a banking association and corporation duly established and organized under the banking laws of the United States, and since his appointment as such receiver he has duly demanded of defendant the amount of said checks collected by defendant and of said deposit of money, being in all $11,008.20, and defendant declined and refused, and still declines and refuses, to pay the same or any part thereof, and plaintiff says defendant owes him said sum of $11,008.20 and interest thereon.

Second count. The plaintiff says he is the receiver of the Pacific National Bank of Boston, duly appointed by the Comptroller of the Currency and now acting as such; that said Pacific National Bank and defendant are both banking associations and corporations duly established and organized under the banking laws of the United States and located at said Boston; that on May 22, 1882, de-

9 fendant, by Charles R. Batt, its cashier, duly appointed, made an instrument in writing, commonly called a certificate of deposit, payable to the order of E. C. Whitney, cashier, said Whitney being then the cashier of said Pacific National Bank, for the sum of eleven thousand and eight $\frac{20}{100}$ dollars, payable to the order of said Whitney, cashier, on the return of said certificate properly indorsed;

that thereafter the said plaintiff, as such receiver, duly presented to said defendant bank said certificate, duly indorsed, and demanded payment thereof, but said defendant declined and refused, and still declines and refuses, to pay plaintiff same or any part thereof, and defendant owes said plaintiff the amount thereof with interest. A copy of said certificate is hereto annexed, marked "B."

Third count. The plaintiff says the Pacific National Bank of Boston is a banking association and corporation duly organized under the banking laws of the United States, and he is the receiver thereof, duly appointed by the Comptroller of Currency, and now acting as such; that defendant is a national bank and a corporation duly organized under the laws of the United States and located at said Boston; that defendant owes plaintiff as such receiver the sum of eleven thousand and eight $\frac{20}{100}$ dollars, as and for money had and received by defendant to the plaintiff's use, and interest thereon, to the damage of the said plaintiff (as he says) the sum of twenty thousand dollars.

List of Checks Annexed to First Count, Marked A.

Checks on—		Amounts.
National Bank of the Commonwealth,	Boston	$7 00
Suffolk National Bank,	"	17 82
" " "	"	83 74
National Bank of Commerce,	"	294 64
Blackstone National Bank,	"	17 13
National Bank of Redemption	"	635 75
" " "	"	1,587 56
" " "	"	531 78
Second National Bank,	"	1,653 47
National Exchange Bank,	"	5,136 30
10 New York banks		131 42
" "		14 87
" "		62 85
" "		394 20
National Security Bank,	Boston	25 00
National Bank of Redemption,	Boston	108 68
Central National Bank,	"	4 02
Mount Vernon National Bank,	"	14 50
Lowell (Mass.) Bank		6 60
" " "		7 50
" " "		11 31
" " "		12 60
Boston Safe Deposit and Trust Co.,	Boston	50 00
New England Trust Co.,	"	9 20
U. S. Sub-Treasury,	"	150 00
National Security Bank (being balance of Pac. Bank deposited)		40 24
		$11,008 20

Copy B.

No. 6316. NATIONAL SECURITY BANK,
$11,008.20. BOSTON, *May* 22, 1882.

E. C. Whitney, cash., has deposited in this bank eleven thousand and eight $\frac{20}{100}$ dollars, payable to the order of himself on the return of the certificate properly indorsed.

(Signed) CHAS. R. BATT, *Cashier.*

Bill of Particulars Annexed to Third Count.

Amounts collected by defendant as proceeds of checks in following banks, viz:

1.	National Bank of Commonwealth, Boston	$7 00
2.	Suffolk National Bank, "	17 82
3.	" " " "	83 74
4.	National Bank of Commerce, "	294 64
5.	Blackstone National Bank, "	17 13
6.	National Bank of Redemption, "	635 75
11 7.	National Bank of Redemption, Boston	1,587 56
8.	" " " "	531 78
9.	Second National Bank, "	1,653 49
10.	National Exchange Bank, "	5,136 30
11.	New York banks	131 42
12.	" "	14 87
13.	" "	62 85
14.	" "	394 20
15.	National Security Bank, Boston	25 00
16.	National Bank of Redemption, Boston	108 68
17.	Central National Bank, "	4 02
18.	Mt. Vernon National Bank, "	14 50
19.	Lowell (Mass.) banks	6 60
20.	" " "	7 50
21.	" " "	11 31
22.	" " "	12 60
23.	Boston Safe Deposit and Trust Co., Boston	50 00
24.	New England Trust Co.	9 20
25.	U. S. Sub-Treasury	150 00
26.	National Security Bank (being Pacific Bank's deposit)	40 24
		$11,008 20

This action was entered at the December term of this court, A. D. 1882, and the following is the marshal's return therein, viz.:

UNITED STATES OF AMERICA, *Massachusetts*, } *ss:*

BOSTON, *Nov.* 21, 1882.

Pursuant hereunto, I have this day, at nine o'clock and — minutes a. m., attached a chip, the property of said defendant, and there-

after, the same day, delivered a summons of this writ to S. A. Carlton, president of said bank.

N. P. BANKS,
U. S. Marshal,
By B. B. JOHNSON, *Deputy.*

12 On the first day of January, A. D. 1883, the following answer of defendant and declaration in set-off was filed in court, viz.:

Defendant's Answer.

And now comes the defendant in the above-entitled action and denies each and every allegation in the plaintiff's writ and declaration and every count in said declaration contained, except as hereinafter expressly admitted.

And the defendant, further answering, admits that the said Pacific National Bank, on or about May 22, 1882, transferred to and deposited with the defendant bank certain checks on other banks, a list whereof is annexed to the plaintiff's declaration, marked "A," and a deposit of money to its credit in defendant bank, amounting in all to eleven thousand and eight and $\frac{20}{100}$ dollars and no more; that the defendant thereupon, in consideration thereof, gave to the said Pacific National Bank a certificate of deposit for the said sum of eleven thousand and eight $\frac{20}{100}$ dollars, like that a copy whereof, annexed to the plaintiff's declaration, is marked "B."

And this defendant, without admitting the right of said Linus M. Price, as receiver as aforesaid, to have or maintain any action in his own name upon any claim due to said Pacific National Bank, and particularly upon the instrument a copy whereof is annexed to the plaintiff's declaration and marked "B," further says that it has a claim in set-off against said Pacific National Bank, as set forth in the declaration in set-off filed herewith, of the benefit whereof this defendant may be deprived by the maintenance of said action in the name of Linus M. Price, receiver; wherefore this defendant says that said action ought to be brought, if this defendant is liable to anybody for any of the causes of action set forth in said declaration, in the name of said Pacific National Bank, and not in the name of said Linus M. Price, as receiver thereof or otherwise.

NATIONAL SECURITY BANK,
By its attorney, JOHN C. COOMBS.

13 *Defendant's Declaration in Set-off.*

And now comes the defendant and admits and says that both said Pacific National Bank and itself are banking associations and corporations duly established under the laws of the United States, and that each is located and does business in said Boston, and that said Linus M. Price is the receiver of said Pacific National Bank, and brings said action against this defendant in his capacity as such receiver and not otherwise.

And this defendant further says that, for value received, on May

13, A. D. 1882, said Pacific National Bank, by E. C. Whitney, its cashier, duly authorized, made an instrument in writing, commonly called a certificate of deposit, for the sum of ten thousand dollars, payable to the order of National Security Bank on the return of said certificate properly indorsed, a copy whereof is hereto annexed, marked "D," and payment thereof was duly demanded, and the defendant neglected and refused to pay the same.

And said Pacific National Bank owes, and said Linus M. Price, as the receiver of said Pacific National Bank, for the purpose of a set-off to the cause of action set forth in the plaintiff's declaration, owes, this defendant the amount of said certificate of deposit, to wit, ten thousand dollars and interest thereon.

Second count. And the defendant further says that one M. Karger made a certain instrument in writing, commonly called a draft or check, for five hundred dollars, directed to one S. Kuhn and Sons, payable to one S. Hirshberg and Bros., or order, and said Hirshberg and Bros. indorsed the same to said Pacific National Bank. A copy of said draft with indorsement thereon is hereto annexed, marked "E;" and said Pacific National Bank deposited with and transferred and delivered said draft to this defendant and requested this defendant to advance and pay and this defendant did advance and pay to it, said Pacific National Bank, on account of and in anticipation of the due payment of said draft by said S. Kuhn and Sons, the sum thereof, to wit, five hundred dollars, and payment of said draft was duly demanded by said S. Kuhn and Sons, who neglected to pay the same, and due notice of its non-payment was given to
14 said Pacific National Bank; and said Pacific National Bank, and the plaintiff as receiver thereof, for the purpose of set-off as aforesaid, owe the defendant the amount of said draft and interest thereon.

Third count. For the same cause of action as the last preceding count.

And the defendant further says that the said Pacific National Bank, and the plaintiff as receiver thereof, for the purpose of set-off as aforesaid, owes it five hundred dollars for money received by the plaintiff to the defendant's use.

Fourth count. And the defendant further says that one Henry Stein and Company made a certain instrument in writtng, commonly called a draft or check, for two hundred dollars, a copy of which, with the indorsement thereon, is hereto annexed, marked "F," directed to the Importers' and Traders' National Bank of the State of New York, payable to the cashier of the said Pacific National Bank, or order, and E. C. Whitney was the cashier of said Pacific National Bank, and as such and for and in behalf of said Pacific National Bank, for value received, indorsed the same to the defendant, and payment of said draft was duly demanded of the said Importers' and Traders' National Bank, who neglected to pay the same, and due notice of its non-payment was given to said Pacific National Bank and the cashier thereof, and said Pacific National Bank, and said plaintiff as receiver thereof, for the purpose of set-off

as aforesaid, owes the defendant the amount of said draft and interest thereon.

NATIONAL SECURITY BANK,
By its attorney, JOHN C. COOMBS.

Copy D.

THE PACIFIC NATIONAL BANK OF BOSTON, MASS.

$10,000. BOSTON, *May* 13*th*, 1882.

This certifies that there has been deposited in this bank ten thousand dollars, payable to the order of Nat. Security Bank on return of this certificate properly indorsed.

No. 2513. E. C. WHITNEY, *Cashier.*

(Countersigned) G. H. BENYON, *Teller.*

15 Copy E.

No. 872. CINCINNATI, *May* 15*th*, 1882.

S. Huhn & Sons (stamp), 72 West Third Street:

Pay to S. Hirshberg & Bros., or order, five hundred $\frac{no}{000}$ dollars (500\frac{no}{000}$).

M. KARGER.

(And indorsed on the back:) S. Hirshberg & Bros.

Copy F.

[Stamp.] No. 82. BOSTON, *May* 20*th*, 1882.

THE IMPORTERS' AND TRADERS' NATIONAL BANK OF NEW YORK.

The New York Clearing House Association pay to cashier Pacific National Bank, or order, two hundred dollars.

$200. HENRY STEIN & CO.,
Per JACOB COLBORN, *Attorney.*

(Indorsed on back:) E. C. Whitney.

From said December term, A. D. 1882, this action was continued to the March term of this court, A. D. 1883, when, on the seventeenth day of April, A. D. 1883, the following amendment to declaration was filed in court by consent, viz:

Amendment to Declaration.

The plaintiff moves to amend his declaration by striking out the first count in the same and substituting therefor the following amended count in place of same.

By his attorney, A. A. RANNEY.

16 The plaintiff says that the Pacific National Bank of Boston, heretofore and prior to the acts herein mentioned, was duly organized and authorized to do business as a national bank or banking association under and by virtue of an act of Congress

whose provisions are embraced in title sixty-two of the Revised Statutes of the United States, located and having its banking house at Boston, in the State of Massachusetts; that it thereafter proceeded to do the business of banking at said Boston, and was subject to said acts of Congress and the provisions of all other acts of Congress supplemental thereto and in amendment thereof; that said banking association became insolvent and failed, and the Comptroller of the Currency, on the twenty-second day of May, A. D. 1882, upon being satisfied of the insolvency of said bank, appointed the said plaintiff receiver of same, and he was thereupon duly qualified to act in that capacity for the purpose of closing up said association, with all the rights, powers, and duties conferred upon him by acts of Congress and the law in that behalf provided; that said bank stopped busines and closed its doors on the twentieth day of May, A. D. 1880, being deeply inshlvent and unable to pay its debts and liabilities; that steps were on that day taken to represent it insolvent to the said comptroller and have a receiver appointed in conformity to law for the purpose of closing up the association; that it was determined not to open the doors of the bank or carry on business longer on the said twentieth day of May, 1882; that on that day the said defendant bank was owing the said Pacific National Bank in account as a balance on book the sum, or about the sum, of $40.24, and the said defendant bank also held against said Pacific National Bank other claims and demands, and particularly a so-called obligation or certificate of deposit for $10,000, or thereabouts, and other claims as alleged; that on the twenty-second day of May, 1882, the said Pacific National Bank, through its cashier, although it was then insolvent or contemplated insolvency and had then actually failed and stopped business and taken the steps afore-
17 said for the appointment of a receiver, transferred and delivered to the defendant bank certain checks, drafts, bills, and other property, which are described and named in the schedule hereto annexed and marked — , the amount of which on their face and value was the sum, or about the sum, of $ — ; that this sum, including an alleged balance due from the defendant bank to the said Pacific National Bank, to wit, the balance of $40.24 aforesaid, amounted to $11,008.20, and that thereupon the defendant bank gave to E. C. Whitney, cashier of said Pacific National Bank, a so-called certificate of deposit, a copy of which is hereto annexed, marked B; that on same day the said Whitney gave C. R. Batt, cashier of defendant bank, a paper writing, of which a copy is hereto annexed, marked C; that the last said paper was signed and delivered soon after the said transfer and deposit were made; that said defendant bank collected and received the money upon the said checks, drafts, bills, or papers so delivered, transferred, or deposited as aforesaid; that the said plaintiff, after his said appointment, took possesion of the assets and property of the said National Pacific Bank, and said paper writing, called a certificate of deposit, was delivered to him among the other assets of the bank; that he stood and stands upon all the rights of the bank of which he is receiver as afore-

said and of the creditors thereof; that upon his appointment he demanded of the said defendant bank the said property so delivered to them or the avails thereof, but the defendant refused to deliver or pay the same, claiming a right to set off the same or apply the same on the alleged indebtedness of the said Pacific National Bank to it, the said defendant, especially the said certificate of deposit for $10,000 held by the defendant.

The plaintiff says and avers that the said Pacific National Bank was, on said twentieth day of May and for a long time before then, insolvent and unable to pay its debts and liabilities and has been so ever since; that the said Pacific National Bank, its directors and officers, well knew the same and contemplated insolvency; that said Pacific Bank was in the same or a worse condition on May 22, 1882, when said transactions were had on that day, and have been ever since; that on the closing up of said bank the property and assets of the same will only pay but a small per cent. of its then
18 indebtedness; that the said transfers of property or the deposits thereof named were in fraud of the creditors of the said Pacific National Bank with the view of giving the defendant a preference over its other creditors by having the same operate as payment of the debts due defendant bank by the said Pacific National Bank by way of set-off or otherwise; that the said transfers and deposits of property were illegal, and if allowed to operate as a set-off or in payment of said indebtedness it will work an unlawful preference of one creditor over another; that the said Pacific National Bank, its officers, and especially said Whitney, as cashier, well knew when he made said transfer of property and said deposits after said bank was insolvent and had actually failed and stopped business and proceedings were being had for the appointment of a receiver to close up the association that the same or the avails thereof when collected or the said paper writing or certificate of deposit would be or might be availed of for the payment of the indebtedness aforesaid due said defendant by way of set-off or otherwise, and contemplated the same or was bound and is presumed by law to have contemplated and intended the same. The plaintiff avers further that said defendant promised to pay the said checks or the avails thereof to the receiver when appointed and took the same in his behalf.

The plaintiff says and avers that the defendant bank owes him and is bound to pay him, as receiver, the said sum of $11,008 $\frac{20}{100}$, with interest thereon, or at least that sum, less the $40.24, the balance due the said Pacific National Bank as balance of account on May 20, 1882, and he brings this suit to recover the same.

By his attorney, A. A. RANNEY.

A.

List of checks deposited by the Pacific National Bank of Boston with the National Security Bank of Boston on May 22d, 1882, and for which the Security Bank gave their certificate of deposit, No. 6316, for $11,008.20 in return.

Checks on the following banks:

19	National Bank of Commonwealth, Boston		$7 00
	Suffolk National Bank,	"	17 82
	" " "	"	83 74
	National Bank of Commerce,	"	294 64
	Blackstone National Bank,	"	17 13
	National Bank of Redemption,	"	635 75
	" " "	"	1,587 56
	" " "	"	531 78
	Second National Bank,	"	1,653 49
	National Exchange Bank,	"	5,136 30
	New York banks		131 42
	" "		14 87
	" "		62 85
	" "		394 20
	National Security Bank, Boston		25 00
	" Bank of Redemption, Boston		108 68
	Central National Bank,	"	4 02
	Mount Vernon National Bank,	"	14 50
	Checks on Lowell (Mass.) banks		6 60
	" " " "		7 50
	" " " "		11 31
	" " " "		12 60
	Boston Safe Deposit & Trust Co., Boston		50 00
	New England Trust Co.,	"	9 20
	U. S. Sub-Treasury,	"	150 00
	National Security Bank, Boston (our balance deposited there)		40 24
			$11,008 20

B.

No. 6216. NATIONAL SECURITY BANK,

$11,008$\frac{20}{100}$. BOSTON, *May* 22, 1882.

E. C. Whitney, cash., has deposited in this bank eleven thousand and eight $\frac{20}{100}$ dollars, payable to the order of himself on the return of this certificate properly indorsed.

CHAS. R. BATT, *Cashier.*

20 C.

2373.

Lewis Coleman, president. E. C. Whitney, cashier.

Receiver's office, the Pacific National Bank, No. 105 Devonshire St. (directly opposite post office). Linus M. Price, receiver.

BOSTON, *May* 22, 1882.

C. R. Batt, cashier:

SIR: I hold your certificate of deposit for $11,008.20 given in payment for our balance, said certificate having been given principally for checks on other banks not yet collected by you received by us in due course of business and delivered to your bank for collection. I agree to hold it and not to use it until said checks shall be collected by you, subject to the demands of a receiver and for the protection of your bank on account of said checks, but without any personal responsibility on my part.

E. C. WHITNEY, *Cashier.*

On the seventeeth day of April, A. D. 1883, the following answer to declaration in set-off was filed in court by consent, viz:

Answer to Declaration in Set-off.

The said plaintiff, for answer to the defendant's declaration in set-off, says that he denies each and every allegation, item, and particular in defendant's declaration in set-off and in each count thereof contained, the same as if each was specified and repeated herein and denied separately and in its order.

He says further that if the demands and indebtedness set up and alleged in said declaration in set-off exist they are only such as can be proved before him, as receiver, and allowed among the other debts of the Pacific National Bank, so that the defendant may share equally with the other creditors of said Pacific National Bank, of which plaintiff is receiver, and that they are not subjects of set-off in this suit.

21 He says and avers that the said demands and debts existed and accrued, if at all, prior to May 20, 1882; that on that day the said Pacific National Bank was deeply insolvent and failed; that on said day directors of said association were sent to Washington to communicate the fact of insolvency to the Comptroller of the Currency and to have a receiver of the bank appointed, and it was then determined not to continue business longer or to open the doors of said bank for business again; that, accordingly, on the twenty-second day of May, 1882, the Comptroller of the Currency, under and in pursuance of the act of Congress entitled "An act authorizing the appointment of receivers of national banks, and for other purposes," approved June 30, 1876, appointed the said plaintiff as receiver of said Pacific National Bank for the purpose of closing up said association, he being satisfied of its insolvency, and said plaintiff took possession of the assets and property of said

bank and proceeded to close the same up, with all the rights and powers conferred by acts of Congress and by law in that behalf. He says and avers further that on the 22d day of May, 1882, after said Pacific National Bank had failed and became insolvent and were contemplating insolvency, and after they had taken the steps aforesaid for the appointment of a receiver and had concluded not to continue their business further, they, the said Pacific National Bank, by their cashier, with full knowledge of their insolvency, and knowing that said defendant bank held claims and demands against said Pacific National Bank, and the ones declared on in said declaration in set-off all are a part of the same, proceeded to deliver and transfer and to deposit to and with said defendant bank the property described and specified in plaintiff's said declaration and the schedule thereto annexed; that the same was done when the bank was insolvent or in contemplation of insolvency, with a view of giving a preference to said defendant bank over other creditors of said Pacific National Bank by thus enabling the defendant to use in set-off, if possible, the claims and demands which they held against the said Pacific National Bank, and which they have set up in their said declaration in set-off, and as a defence to the claim which the receiver might have for the claims sued for by him when he was appointed; that said transfer, delivery,
22 and deposit of the property hereinbefore described was a fraud upon the creditors of said Pacific National Bank, and the set-off alleged and claimed in said declaration in set-off, if allowed, would operate as an illegal preference over the other creditors of said Pacific National Bank, whose debts, as due from bank last named and proved before said receiver, amount to not less than $———, and enable the said defendant bank to get its pay in full, while the other creditors would and will get but a small percentage of theirs.

The plaintiff says further that the said defendant bank, in case the said Pacific Bank did not deliver and transfer to and deposit with said defendant the said property named, with the view of giving them a preference over other creditors, as hereinbefore alleged, did receive the same, with the agreement that they should be subject to the demands of a receiver when appointed; that said Pacific National Bank, being indebted to defendant bank, transferred and delivered to the latter and deposited therewith the said property hereinbefore described for the purpose of paying the said indebtedness when said Pacific National Bank was insolvent or contemplated insolvency and with a view of giving said defendant a preference over other creditors, and that a certificate of deposit was given said Pacific National Bank for the sum of eleven thousand and eight $\frac{20}{100}$ dollars for an alleged balance due said Pacific National Bank, and that the said delivery, transfer, and the deposit were illegal, contrary to the acts of Congress, fraudulent as against the other creditors of said Pacific National Bank, and were null and void; that defendant had no right to set-off the claims and demands alleged and set up in said declaration in set-off as a defence to the action of plaintiff, for the further reason that the de-

fendant bank took said property, as the plaintiff states and avers, with the knowledge and with the express agreement and understanding that a receiver was to be appointed, or was then already appointed, to close up said Pacific Bank, and that said check or drafts or the avails thereof, if collected and when collected, should be paid to the receiver, and subject to his demand and claim for same.

The plaintiff says further that the certificate of deposit for ten thousand dollars set up in the declaration in set-off was extended, and the time of payment extended, for four, eight, and
23 twelve months from its date, and made payable in three several instalments at those dates; that the same was without consideration, and was given without authority of law and was illegal and void.

By his attorney, A. A. RANNEY.

On the 23d day of April, A. D. 1883, the following amendment to defendant's declaration in set-off was filed in court by consent and allowed, viz:

Amendment to the Defendant's Declaration in Set-off.

And now comes the defendant and moves for leave to amend its said declaration in set-off in said case by striking out the second and third counts thereof, and the defendant repeats and reiterates its declaration in set-off as amended as and for its declaration in set-off to the plaintiff's declaration as amended.

NATIONAL SECURITY BANK,
By its attorney, JOHN C. COOMBS.

On said 23d day of April, A. D. 1883, the following answer of defendant to plaintiff's amended declaration was filed in court by consent and allowed, viz:

Defendant's Answer to Plaintiff's Amended Declaration.

And now comes the defendant and denies each and every allegation in the plaintiff's amended declaration contained, except so far as any allegation thereof may be expressly admitted in the defendant's amended answer to the plaintiff's original declaration, and the defendant repeats and reiterates its answer as amended to the plaintiff's said declaration as said declaration was originally filed, as and for its further answer to said declaration as amended.

NATIONAL SECURITY BANK,
By its attorney, JOHN C. COOMBS.

24 On said 23d day of April, A. D. 1883, the following motion to amend defendant's answer was filed in court by consent, viz:

Motion to Amend Defendant's Answer.

And now comes the defendant and moves for leave to amend its answer in the above-entitled action by inserting immediately after the following words, as they appear consecutively in said answer, "that the defendant thereupon, in consideration thereof," the following words and phrases, "and of a certain check drawn by said Pacific National Bank to the amount thereof, payable to the National Security Bank," and by inserting immediately after the following words, as they appear consecutively in said answer, "a copy whereof annexed to the plaintiff's declaration is marked 'B,'" the following words and phrases, "which certificate the defendant has at all times been ready and willing and has offered to pay to said Pacific National Bank or its proper representative, less the amount of certain items of and an account in set-off held by said National Security Bank against said Pacific National Bank, a statement whereof is contained in the declaration in set-off filed herewith in said case."

NATIONAL SECURITY BANK,
By its attorney, JOHN C. COOMBS.

From said March term, A. D. 1883, this action was continued from term to term to this present term, and on the twenty-second day of April, A. D. 1884, the following motion to amend defendant's declaration in set-off was filed in court by consent, viz:

Motion to Amend Defendant's Declaration in Set-off.

And now comes the defendant and moves for leave to amend the first count of his said declaration in set-off by adding immediately after the words, "and payment thereof was duly demanded," therein contained, the words, "by the defendant, and such demand was also waived by the plaintiff, and was rendered unnecessary and unavailable because of the insolvency of said Pacific National Bank."

Also by adding the following count to said declaration in set-off:

And now comes the defendant and admits and says that both said Pacific National Bank and itself are banking associations and corporations duly established under the laws of the United States, and that each is located and does business in said Boston, and that said Linus M. Price is the receiver of said Pacific National Bank and brings his said action against this defendant in his capacity as such receiver and not otherwise, and said Pacific National Bank owes, and said Linus M. Price, as the receiver of said Pacific National Bank (for all the purposes of a set-off to the cause of action set forth in plaintiff's declaration), owes, this defendant, to wit, said National Security Bank, the sum of ten thousand dollars, as and for money had and received by defendant to the plaintiffs use, and interest thereon.

NATIONAL SECURITY BANK,
By its attorney, JOHN C. COOMBS.

Issue being thus joined, this cause was, on the twenty-fourth day of March, A. D. 1884, committed to a jury which had been duly impanelled and sworn to try the same, who, after hearing all matters and things concerning the same, returned their verdict therein, and upon oath said that they "find for the plaintiff and assess damages in the sum of twelve thousand two hundred and thirty-two dollars and eighty-eight cents."

On the twenty-sixth day of April, A. D. 1884, the following exceptions of defendant were filed in court and allowed, viz:

Defendant's Bill of Exceptions.

This was an action of contract by the receiver of the Pacific National Bank to recover the sum of $11,008.20 deposited with the defendant bank by the cashier of the Pacific Bank before plaintiff's appointment as receiver.

The declaration contained three counts, all being for the
26 same cause of action. The first count sought to recover this sum as having been unlawfully deposited with the defendant in violation of section 5242 of the Revised Statutes of the United States, and as being a payment after the commission of an act of insolvency by the Pacific Bank, and with a view to preferring defendant to other creditors of the Pacific Bank, and to prevent the application of the assets of that bank in the manner prescribed by the laws of the United States, and also on a promise by the defendant to pay the money made after the insolvency of the Pacific Bank was known to both parties and in view of that fact.

The second count was on a negotiable certificate of deposit for the above sum given by defendant to the Pacific Bank.

The third count was for money had and received.

The pleadings may be referred to.

The defendant pleaded in set-off and claimed to be allowed a negotiable certificate of deposit for $10,000 given by the Pacific Bank to the defendant and held by the defendant at the time of the deposit above mentioned and ever since.

At the trial it was admitted that $40.25, parcel of the amount sought to be recovered, was on deposit in the defendant bank before the commission of any act of insolvency by the Pacific Bank, and that as to so much of the plaintiff's claim the set-off was a good answer.

As to the rest of the claim the following facts were proved or admitted:

On Saturday, May 20, 1882, the Pacific Bank, which had previously failed in November, 1881, and had afterwards reorganized and done business, being deeply insolvent, its directors held a meeting in the afternoon, after the regular close of business for the day, and passed these votes, which votes and the proposed action the directors purposely kept concealed until they were carried out—

"Voted, To go into liquidation.

"Voted, That the bank be closed to business.

"Voted, That Lewis Coleman, president; Micah Dyer, Jr., Andrew

F. Reed, directors, and William J. Best be, and hereby are, appointed a committee to proceed to Washington to confer with the Hon. John J. Knox, Comptroller of the Currency, as to the measures
27 proper to be taken in the present situation; that if the Comptroller shall deem it necessary to appoint a receiver the directors unanimously recommend for that position Mr. E. C. Whitney, who since March 18 has discharged the duties of cashier with great ability, diligence, and energy, and who is perfectly familiar with the assets, liabilities, and affairs of the bank and thoroughly understands the steps necessary to be taken to speedily and profitably realize upon the estate to the fullest extent; that if Mr. E. C. Whitney shall be appointed receiver of the bank the directors will furnish satisfactory bonds for the faithful discharge of his duties to any amount which the Comptroller may require."

And the bank never after did any business except so far as appears in this bill. The committee of the directors went to Washington on Saturday night and on Monday, May 22, saw the Comptroller, who appointed the plaintiff receiver about ten o'clock a. m., and the plaintiff left Washington on Monday and on the following day arrived in Boston and took possession of the bank.

For some time before this, and ever since the resuscitation of the bank after its first failure, the Pacific Bank, not being a member of the Boston clearing-house, had been in the habit daily of depositing with the defendant all checks received by the Pacific Bank to be collected through the clearing-house by the defendant, with which the Pacific Bank was credited as a depositor and against which it drew.

On Monday morning, May 22, Whitney, the cashier of the Pacific Bank, received by mail, as usual, many letters enclosing drafts and checks, and sent all these checks and drafts, amounting to $10,967.95, to the defendant bank, where they were received and forthwith sent to the clearing-house with other checks to be cleared by defendant.

The messenger who carried the checks to the defendant took at the same time and presented to the defendant a check drawn by Whitney for $11,008.20, being the whole amount of the checks then deposited and $40.25 already to the credit of the Pacific Bank on its current deposit account with the defendant.

The defendant's paying-teller, at the messenger's request, gave him the defendant's negotiable certificate of deposit, payable on demand, for the said sum of $11,008.20. The defendant at that
28 time held the negotiable certificate of deposit of the Pacific Bank, payable on demand, for $10,000. Copies of both of these certificates are hereto annexed, marked Exhibits "A" and "B."

These transactions took place as early as half-past nine on the morning of May 22, and no officer of the defendant bank then knew or suspected that the Pacific Bank was insolvent or contemplating insolvency, or was not doing business as usual, or that its directors had voted to close it, or that application was to be made for a re-

ceiver, and no application had, in fact, at that time been made to the Comptroller, it being made about 10 a. m. of that day.

The parties have duly demanded of each other payment of their respective claims.

There was other evidence given in the case on both sides, and particularly on the question whether any—and, if any, what—agreement was afterwards — between Whiting, the cashier of the Pacific Bank, and Batt, the cashier of the defendant bank, as to the terms and conditions on which the deposit made on May 22nd, as above stated, should be held by the defendant, part of this evidence consisting of a letter from Whitney to Batt. The defendant requested the judge to submit to the jury the three following questions: First, whether or not there was in fact any view or intent on the part of the Pacific Bank or any of its officers to give a preference to the defendant over other creditors, or to prevent the application of the assets of the Pacific Bank in the manner prescribed in the bank act; second, whether or not any subsequent agreement was made varying the relation of the two banks as they existed at the time the checks were deposited; third, if the jury answer the preceding question in the affirmative, whether or not such agreement was expressed in Whitney's letter.

The defendant at the same time prayed the judge to give several rulings on matters of law applicable to the facts as they might be found by the jury on the above issues.

But the judge refused to submit the above or any questions whatever to the jury or to give any of the rulings prayed for, on the ground that the issues were immaterial, and that there was no question for the jury, and ruled as matter of law that on the undisputed facts in the case the plaintiff was entitled to recover the amount of
29 the checks and drafts deposited by the Pacific Bank in defendant bank on Monday; that the vote passed by the directors of the Pacific Bank on Saturday, the bank being then insolvent, followed by the application for a receiver and the appointment of a receiver by the Comptroller of the Currency on Monday, was an act of insolvency by the Pacific Bank within the meaning of sect. 5242 of the Revised Statutes of the United States, and that after the passage of that vote by the directors the cashier of the Pacific Bank had no authority to make any such disposition of the checks and drafts received by him on Monday as to enable the defendant bank to apply them or their proceeds in payment of or as a set-off against the debt then due to it from the Pacific Bank, and that it was immaterial whether, at the time the checks and drafts were deposited in the defendant bank on Monday, it had notice of the act of insolvency of the Pacific Bank or not; and he accordingly directed a verdict for the plaintiff for $12,232.88, that being the amount of the checks and drafts, with interest from the date of the writ, and to the above rulings and refusals to rule the defendant alleged exceptions.

By its attorneys, J. C. COOMBS.
RUSSELL GRAY.

The foregoing bill of exceptions, being found to be conformable to the facts, is allowed by the court.

THOMAS L. NELSON,
District Judge.

EXHIBIT A.

No. 6316. NATIONAL SECURITY BANK,
$11,008.20. BOSTON, *May* 22, 1882.

E. C. Whitney, cashier, has deposited in this bank eleven thousand and eight $\frac{20}{100}$ dollars, payable to the order of himself on the return of the certificate properly indorsed.

(Copy.)

CHAS. R. BATT, *Cashier.*

30 EXHIBIT B.

THE PACIFIC NATIONAL BANK OF BOSTON, MASS.,
$10,000. BOSTON, *May* 13, 1882.

This certifies that there has been deposited in this bank ten thousand dollars, payable to the order of National Security Bank on return of this certificate properly indorsed.

No. 2513.

(Copy.)

E. C. WHITNEY, *Cashier.*

(Countersigned) G. H. BENYON, *Teller.*

And now, on this twenty-third day of June, A. D. 1884, in accordance with the foregoing verdict, it is considered by the court that the said Linus M. Price, receiver, plaintiff, recover against the said National Security Bank, defendant, the sum of twelve thousand two hundred and thirty-two dollars and eighty-eight cents, debt, and costs of suit, taxed at forty-nine dollars and forty-nine cents.

I, Elisha Bassett, deputy clerk of the district court of the United States within and for the district of Massachusetts, hereby certify that the foregoing is a true copy of the record and proceedings in the foregoing suit, with all things concerning the same.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court this thirty-first day of July, A. D. 1884.

[SEAL.] ELISHA BASSETT,
Deputy Clerk.

31 This cause is entered at the present October term of this circuit court, A. D. 1884, when the same is set down for hearing and fully heard by the court.

On the sixth day of January, A. D. 1885, the opinion of the court is filed, and it appearing to the court here that in the said record and proceedings in the district court there is no error, it is thereupon, to wit, January 6, 1885, considered by the court here that the

said judgment of the district court in this cause be affirmed, and that the said Linus M. Price, receiver, recover against the said National Security Bank the sum of twelve thousand two hundred and thirty-two dollars and eighty-eight cents, debt, and costs of suit, taxed at forty-nine dollars and forty-nine cents, amounting to twelve thousand two hundred and eighty-two dollars and thirty-seven cents, as adjudged by said district court, together with three hundred and ninety-seven dollars and five cents interest on said judgment from June 23, 1884, to said sixth day of January, 1885, and costs of suit, taxed in the circuit court at thirteen dollars and thirty-one cents, amounting in all to the sum of twelve thousand six hundred and ninety-two dollars and seventy-three cents.

A true record.

Attest: JOHN G. STETSON, *Clerk.*

32 The following is the opinion of the circuit court in accordance with which the judgment of the circuit court was entered January 6, 1885, affirming the judgment of the district court:

Opinion of the Court. Filed January 6, 1885.

Circuit Court of the United States, District of Massachusetts.

THE NATIONAL SECURITY BANK, Defendant, Plaintiff in Error,
v.
LINUS M. PRICE, Receiver, Plaintiff, Defendant in Error. } No. 2284.

COLT, *J.:*

This case comes here upon exceptions to the rulings of the district court.

The directors of the Pacific National Bank of Boston, at a meeting held after business hours on the afternoon of Saturday, May 20, 1882, voted to close the bank and to go into liquidation. A committee was also appointed to proceed to Washington and confer with the Comptroller of the Currency.

The Comptroller, on Monday, May 22, appointed the plaintiff receiver. He arrived in Boston the following day and took possession of the bank.

The first failure of the bank was in November, 1881. It afterwards resumed in March, 1882, but, not being a member of the clearing-house, it was its custom daily to deposit with the defendant bank, to be collected through the clearing-house, all checks
33 received. It was credited with the checks so deposited and drew against them. On Monday morning, May 22, and before the appointment of the receiver, the cashier of the Pacific Bank deposited with the defendant bank the checks and drafts received by mail and took in return a negotiable certificate of deposit, payable on demand, for $11,008.20, covering the amount of the deposit just made, and a small sum due on current deposit account. At this time the defendant held a certificate of deposit of the Pacific Bank for the sum of $10,000.

The receiver now seeks to recover back the money so deposited by the cashier, on the ground that the transaction was void. The defendant claims the right of set-off to the extent of its claim against the Pacific Bank.

At the trial the defendant requested the court to submit to the jury the following question, among others:

"Whether or not there was, in fact, any view or intent on the part of the Pacific Bank or any of its officers to give a preference to the defendant over other creditors or to prevent the application of the assets of the Pacific Bank in the manner prescribed in the bank act."

The court refused to submit this or any question whatever to the jury and directed a verdict for the plaintiff, holding that, as a matter of law on the undisputed facts in the case, the plaintiff was entitled to recover the amount of the checks and drafts deposited by the Pacific Bank in the defendant bank on Monday.

It cannot be doubted that on Saturday, May 20, in voting to close its doors and go into liquidation, the Pacific Bank committed an act of insolvency within the meaning of section 5242 of Revised Statutes. Admitting this, the defendant contends that under section 5242 it should further appear that the deposit on Monday was made with a view to give a preference to the defendant over
34 other creditors or to prevent the application of the assets of the bank in the manner prescribed in the act, and that this was a question of fact for the jury.

We agree with the defendant that under section 5242 the transfer or payment by a bank, to be void, must be made after the commission of an act of insolvency, or in contemplation thereof, and with a view of giving a preference to one creditor over another, or with a view to prevent the application of its assets as provided by law. Case *v.* Citizens' Bank, 2 Woods, 23. But the undisputed facts here show that the act of the cashier under the circumstances could have no other result, if allowed to stand, than to operate as a preference in favor of the defendant bank. The Pacific Bank had decided to close its doors and go into liquidation, and after this the necessary consequence of the transfer was to create a preference. It cannot be said that the transfer was made with the intention of going on in business. Jones *v.* Howland, 8 Met., 377. Nor can it be contended that it was made to save the credit of the bank, as was claimed in Case *v.* Citizens' Bank. A person is presumed to intend the necessary consequences of his own acts, and after the vote of the directors to close the bank and go into liquidation any transfer of the assets of the bank to a creditor whereby that creditor secures a preference must be presumed to be made with an intent to prefer. *In re* Silverman, 4 B. R., 523; 1 Saw., 410; Sawyer *v.* Turpin, 2 Low., 29, 33.

Exceptions overruled.

35 UNITED STATES OF AMERICA, *Massachusetts District*, } *ss*:

I, John G. Stetson, clerk of the circuit court of the United States

for the first circuit and district of Massachusetts, certify that the foregoing is a true copy of the record of said circuit court in the cause of The National Security Bank, defendant, plaintiff in error, *v.* Linus M. Price, receiver, plaintiff, defendant in error, lately determined in said circuit court, and of all proceedings therein, including the opinion of the court.

In testimony whereof I hereunto set my hand and affix the seal of said circuit court at Boston, in said district, this eighth day of September, in the year of our Lord one thousand eight hundred and eighty-five, and of the Independence of the United States the one hundred and tenth.

[Seal of the Circuit Court, Massachusetts.]

JOHN G. STETSON, *Clerk.*

36 *Assignment of Errors and Prayer for Reversal.*

Supreme Court of the United States. October Term, 1885.

NATIONAL SECURITY BANK *v.* LINUS M. PRICE, Receiver.

In error to the circuit court of the United States within and for the district of Massachusetts.

And now comes the said National Security Bank and saith that in the record and proceedings and also in giving the judgment aforesaid there is manifest error, in this, to wit, that by the said record and proceedings it appears that the judgment aforesaid was given affirming the judgment of the district court of the United States within and for the district of Massachusetts, whereas by the law of the land judgment ought to have been given by the said circuit court reversing the said judgment of said district court.

There is also error, in this, to wit, that as matter of law on the undisputed facts of the case the said Price, plaintiff in said district court, was not entitled to a verdict.

There is also error, in this, to wit, that the judge of the said district court ought to have submitted to the jury the questions submitted to him for that purpose by the said National Security Bank, as in its bill of exceptions at large recited.

37 There is also error, in this, to wit, that the judge of the said district court ruled that it was material whether or not the said Security Bank had notice of the insolvency of the Pacific National Bank at the time a deposit was made in said Security Bank, as set forth in the bill of exceptions.

There is also error, in this, to wit, that the judge of the said district court ruled that the vote of the directors of the Pacific Bank, followed by the application for and appointment of a receiver, as set forth in the bill of exceptions, was an act of insolvency by said Pacific Bank within the meaning of section 5242 of the Revised Statutes.

There is also error, in this, to wit, that the judge of the said district court ruled that, after the passage of the aforesaid vote by the directors of the Pacific Bank, the cashier of that bank had no authority to make any such disposition of checks or drafts thereafter

The receiver now seeks to recover back the money so deposited by the cashier, on the ground that the transaction was void. The defendant claims the right of set-off to the extent of its claim against the Pacific Bank.

At the trial the defendant requested the court to submit to the jury the following question, among others:

"Whether or not there was, in fact, any view or intent on the part of the Pacific Bank or any of its officers to give a preference to the defendant over other creditors or to prevent the application of the assets of the Pacific Bank in the manner prescribed in the bank act."

The court refused to submit this or any question whatever to the jury and directed a verdict for the plaintiff, holding that, as a matter of law on the undisputed facts in the case, the plaintiff was entitled to recover the amount of the checks and drafts deposited by the Pacific Bank in the defendant bank on Monday.

It cannot be doubted that on Saturday, May 20, in voting to close its doors and go into liquidation, the Pacific Bank committed an act of insolvency within the meaning of section 5242 of Revised Statutes. Admitting this, the defendant contends that under section 5242 it should further appear that the deposit on Monday was made with a view to give a preference to the defendant over
34 other creditors or to prevent the application of the assets of the bank in the manner prescribed in the act, and that this was a question of fact for the jury.

We agree with the defendant that under section 5242 the transfer or payment by a bank, to be void, must be made after the commission of an act of insolvency, or in contemplation thereof, and with a view of giving a preference to one creditor over another, or with a view to prevent the application of its assets as provided by law. Case *v.* Citizens' Bank, 2 Woods, 23. But the undisputed facts here show that the act of the cashier under the circumstances could have no other result, if allowed to stand, than to operate as a preference in favor of the defendant bank. The Pacific Bank had decided to close its doors and go into liquidation, and after this the necessary consequence of the transfer was to create a preference. It cannot be said that the transfer was made with the intention of going on in business. Jones *v.* Howland, 8 Met., 377. Nor can it be contended that it was made to save the credit of the bank, as was claimed in Case *v.* Citizens' Bank. A person is presumed to intend the necessary consequences of his own acts, and after the vote of the directors to close the bank and go into liquidation any transfer of the assets of the bank to a creditor whereby that creditor secures a preference must be presumed to be made with an intent to prefer. *In re* Silverman, 4 B. R., 523; 1 Saw., 410; Sawyer *v.* Turpin, 2 Low., 29, 33.

Exceptions overruled.

35 UNITED STATES OF AMERICA, *Massachusetts District*, } *ss:*

I, John G. Stetson, clerk of the circuit court of the United States

for the first circuit and district of Massachusetts, certify that the foregoing is a true copy of the record of said circuit court in the cause of The National Security Bank, defendant, plaintiff in error, *v.* Linus M. Price, receiver, plaintiff, defendant in error, lately determined in said circuit court, and of all proceedings therein, including the opinion of the court.

In testimony whereof I hereunto set my hand and affix the seal of said circuit court at Boston, in said district, this eighth day of September, in the year of our Lord one thousand eight hundred and eighty-five, and of the Independence of the United States the one hundred and tenth.

[Seal of the Circuit Court, Massachusetts.]

JOHN G. STETSON, *Clerk.*

36 *Assignment of Errors and Prayer for Reversal.*

Supreme Court of the United States. October Term, 1885.

NATIONAL SECURITY BANK *v.* LINUS M. PRICE, Receiver.

In error to the circuit court of the United States within and for the district of Massachusetts.

And now comes the said National Security Bank and saith that in the record and proceedings and also in giving the judgment aforesaid there is manifest error, in this, to wit, that by the said record and proceedings it appears that the judgment aforesaid was given affirming the judgment of the district court of the United States within and for the district of Massachusetts, whereas by the law of the land judgment ought to have been given by the said circuit court reversing the said judgment of said district court.

There is also error, in this, to wit, that as matter of law on the undisputed facts of the case the said Price, plaintiff in said district court, was not entitled to a verdict.

There is also error, in this, to wit, that the judge of the said district court ought to have submitted to the jury the questions submitted to him for that purpose by the said National Security Bank, as in its bill of exceptions at large recited.

37 There is also error, in this, to wit, that the judge of the said district court ruled that it was material whether or not the said Security Bank had notice of the insolvency of the Pacific National Bank at the time a deposit was made in said Security Bank, as set forth in the bill of exceptions.

There is also error, in this, to wit, that the judge of the said district court ruled that the vote of the directors of the Pacific Bank, followed by the application for and appointment of a receiver, as set forth in the bill of exceptions, was an act of insolvency by said Pacific Bank within the meaning of section 5242 of the Revised Statutes.

There is also error, in this, to wit, that the judge of the said district court ruled that, after the passage of the aforesaid vote by the directors of the Pacific Bank, the cashier of that bank had no authority to make any such disposition of checks or drafts thereafter

received by him as to enable the said Security Bank to apply them or their proceeds in payment of or as set-off against the debt then due to it from the Pacific Bank.

There is also error, in this, to wit, that the verdict and judgment of said district court were rendered generally on the plaintiff's whole declaration, the different counts whereof are wholly inconsistent and repugnant.

Wherefore the said National Security Bank, plaintiff in error, prays that for the errors aforesaid the judgment of the said circuit court affirming the judgment of said district court may be reversed, and that the judgment aforesaid of said district court may likewise be reversed.

By its attorneys, J. C. COOMBS,
RUSSELL GRAY.

38 *Bond on Writ of Error.*

Know all men by these presents that we, the National Security Bank, a banking association and corporation duly established by the laws of the United States and located and doing business at Boston, in the district of Massachusetts, as principal, and Samuel A. Carlton & D. Webster King, both of Boston, State of Massachusetts, as sureties, are held and firmly bound unto Linus M. Price, of said Boston, receiver of the Pacific National Bank of said Boston, in the full and just sum of twenty thousand dollars, to be paid to the said Linus M. Price, receiver, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated the twenty-first day of January, in the year of our Lord one thousand eight hundred and eighty-five.

Whereas lately at a circuit court of the United States within and for the district of Massachusetts, in a suit depending in said court between the said National Security Bank, defendants, plaintiffs in error, and the said Linus M. Price, receiver, defendant in error, judgment was rendered against the said National Security Bank, and the said National Security Bank having procured a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Linus M. Price, receiver, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said National Security Bank, plaintiffs in error, shall prosecute their said writ of error to effect and answer all damages and costs, if they fail to make their plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

NATIONAL SECURITY BANK [L. S.]
OF BOSTON,
By C. R. BATT, *Cr.*
SAMUEL A. CARLTON. [L. S.]
D. WEBSTER KING. [L. S.]

Signed, sealed, and delivered in presence of—
C. S. OSGOOD,
Witness to C. R. Batt, Cr., S. A. C., & D. W. K.

Approved:

LE BARON B. COLT,
Circuit Judge.

A true copy.
Attest: JOHN G. STETSON, *Clerk.*

39 The United States of America to Linus M. Price, of Boston, in the district of Massachusetts, receiver of the Pacific National Bank, a corporation duly established under the banking laws of the United States and located at Boston aforesaid, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Massachusetts, wherein the National Security Bank, a banking association and corporation duly established by the laws of the United States and located and doing business at Boston, in said district, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Le Baron B. Colt, circuit judge of the United States for the first judicial circuit, this eighth day of September, in the year of our Lord one thousand eight hundred and eighty-five.

LE BARON B. COLT.
U. S. Circuit Judge, First Judicial Circuit.

Sufficient service of this citation is hereby acknowledged.
C. S. RANNEY,
Att'y for L. M. Price, Rec'r.

Endorsed on cover: Massachusetts C. C. U. S. No. 166. The National Security Bank, plaintiff in error, *vs.* Peter Butler, receiver of the Pacific National Bank. Filed October 20, 1885.

Supreme Court of the United States.

No. 166. October Term, 1888.

In Error to the
CIRCUIT COURT OF THE UNITED STATES
For the District of Massachusetts.

NATIONAL SECURITY BANK,

PLAINTIFFS IN ERROR,

vs.

BUTLER, Receiver,

DEFENDANT IN ERROR.

BRIEF FOR THE PLAINTIFFS IN ERROR.

J. C. COOMBS, } Of Counsel for
RUSSELL GRAY, } Plaintiffs in Error.

Printed by T. W. Ripley, 133 Congress Street,
Boston.

NATIONAL SECURITY BANK

VS.

BUTLER, RECEIVER.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

THIS is a writ of error to reverse a judgment of the Circuit Court of the United States for the district of Massachusetts, which affirmed the judgment of the District Court for the same district, in an action at law.

The original action was brought by Linus M. Price, the receiver of the Pacific National Bank of Boston, against the Security Bank, also a national bank doing business in Boston, to recover the sum of $11,008.20 deposited with the defendant bank by the cashier of the Pacific Bank, before the plaintiff's appointment as receiver. Peter Butler, the defendant in error in this Court, is the successor of said Price as such receiver.

The declaration contained three counts. The first (which was substituted by amendment, Record, p. 9, for the original first count) sought to recover the above-mentioned sum as having been unlawfully deposited with the defendants, in violation of Section 5242 of the Revised Statutes of the United States, and as being a payment after the commission of an act of insolvency by the Pacific Bank, and with a view to preferring the defendants to other creditors of the Pacific Bank, and to prevent the application of the assets of that bank in the manner prescribed by the laws of the United States; and also on a promise by the defendants to pay the money made after the insolvency of the Pacific Bank was known to both parties, and in view of that fact.

The second count (Record, p. 4) was on a negotiable certificate of deposit for the above sum given by the defendants to the Pacific Bank.

The third count (Record, p. 5) was for money had and received.

The defendants' answer admitted the fact of a deposit by the Pacific Bank to the amount alleged in the declaration, and the giving by the defendants of a certificate of deposit as described in the second count of the declaration; and denied all other averments of the plaintiff. (See answer as amended, Record, pp. 7, 15, 16.)

The defendants also pleaded in set-off and claimed to be allowed a negotiable certificate of deposit for $10,000 given by the Pacific Bank to the defendants before the time of the deposit above mentioned, and held by the defendants at that time and ever since. (See declaration in set-off, Record, p. 7, as amended, Record, pp. 15, 16.)

At the trial it was admitted that $40.25, parcel of the amount sought to be recovered, was on deposit in the defendant bank before the commission of any act of insolvency by the Pacific Bank, and that as to so much of the plaintiff's claim the set-off was a good answer.

As to the rest of the case, it was proved or admitted that the plaintiff as receiver held the negotiable certificate of deposit of the defendants as described in the second count of the declaration; that the defendants held a like certificate of the Pacific Bank, as described in the declaration in set-off; and that the parties had duly demanded of each other payment of their respective claims.

It appeared further that the directors of the Pacific Bank, after the close of business on a Saturday, voted to close the bank, to go into liquidation, and to apply for a receiver; that early on the following Monday morning the cashier of that bank deposited with the defendant bank, for collection through the clearing-house, according to the usual course of business for some time between the banks, a number of checks and drafts received by mail that morning at the Pacific Bank; and took in exchange the defendants' certificate of deposit, as described in the second count of the declaration, for the sum of $11,008.20, — being the whole amount then standing to the credit of the Pacific Bank, and consisting of the sum of all the checks and drafts deposited at that time, in addition to the amount of $40.25 previously on deposit. The defendant bank had at that time, no notice that the Pacific Bank was insolvent or contemplating insolvency, or that it was not doing business as usual, or proposed to apply for a receiver; and no such application had at that time been actually made, though it was made afterwards on the same day, in Washington, and the plaintiff was appointed receiver. (Record, pp. 17, 18.)

There was other evidence in the case bearing on the question whether there was any express promise by the defendants, subsequent to the deposit, to pay the plaintiff, as alleged in the amended first count of the declaration. (Record, p. 11.)

At the close of the evidence, the defendants requested the judge to submit to the jury the three following questions: First, whether or not there was in fact any view or intent on the part of the Pacific Bank, or any of its officers, to give a preference to the defendants over other creditors, or to prevent the application of the assets of the Pacific Bank in the manner prescribed in the Bank Act. Second, whether or not any subsequent agreement was made varying the relation of the two banks as they existed at the time the checks were deposited. Third, if the jury answer the preceding question in the affirmative, whether or not such agreement was expressed in a certain letter written by one Whitney, cashier of the Pacific Bank, which had been put in evidence.

The defendants at the same time prayed the judge to give several rulings on matters of law applicable to the facts as they might be found by the jury on the above issues.

But the judge refused to submit the above or any questions whatever to the jury, or to give any of the rulings prayed for, on the ground that the issues were immaterial, and that there was no question for the jury; and ruled as matter of law that, on the undisputed facts in the case, the plaintiff was entitled to recover the amount of the checks and drafts deposited by the Pacific Bank in the defendant bank on Monday; that the vote passed by the directors of the Pacific Bank on Saturday, the bank being then insolvent, followed by the application for a receiver, and the appointment of a receiver by the Comptroller of the Currency on Monday, was an act of insolvency by the Pacific Bank within the meaning of Section 5242 of the Revised Statutes of the United States; and that after the passage of that vote by the directors, the cashier of the Pacific Bank had no authority to make any such disposition of the checks and drafts received by him on Monday as to enable the defendant bank to apply them or their proceeds in payment of or as a set-off against the debt then due to it from the Pacific Bank, and that it was immaterial whether at the time the checks and drafts were deposited in the defendant bank on Monday it had notice of the act of insolvency of the Pacific Bank or not; and he accordingly directed a verdict for the plaintiff for $12,232.88, that being the amount of the checks and drafts with interest from the date of the writ; and to the above rulings and refusals to rule the defendants alleged exceptions.

The jury accordingly found a general verdict for the plaintiff for $12,232.88 (Record, p. 17), and judgment was entered on the verdict. (Record, p. 20.)

The defendants brought a writ of error in the Circuit Court, assigning for errors the rulings and refusals to rule by the District Court as above, and also the entry of a general verdict and judgment on the whole declaration, the several counts of which are inconsistent and repugnant.

The judgment of the Circuit Court affirmed that of the District Court. (Record, p. 20.) And to reverse these judgments this writ of error is brought, and the same errors assigned that were relied on below. (Record, p. 23.)

Specification of Errors.

The plaintiffs in error humbly conceive that the learned judge of the District Court erred in ruling that the vote passed by the directors of the Pacific Bank on Saturday, the bank being then insolvent, followed by the application for a receiver, and the appointment of a receiver by the Comptroller of the Currency on Monday, was an act of insolvency by the Pacific Bank within the meaning of Sect. 5242 of the Revised Statutes of the United States.

And also in ruling that after the passage of that vote by the directors, the cashier of the Pacific Bank had no authority to make any such disposition of the checks and drafts received by him on Monday as to enable the defendant bank to apply them or their proceeds in payment of or as a set-off against the debt then due to it from the Pacific Bank.

And also in ruling that it was immaterial whether at the time the checks and drafts were deposited in the defendant bank on Monday it had notice of the act of insolvency of the Pacific Bank or not.

And also in refusing to submit any question whatever to the jury.

And particularly in refusing to submit to the jury the three following questions: First, whether or not there was in fact any view or intent on the part of the Pacific Bank, or any of its officers, to give a preference to the defendants over other creditors, or to prevent the application of the assets of the Pacific Bank in the manner prescribed in the Bank Act. Second, whether or not any subsequent agreement was made varying the relation of the two banks as they existed at the time the checks were deposited. Third, if the jury answer the preceding question in the affirmative, whether or not such agreement was expressed in Whitney's letter.

And also in ruling that on the undisputed facts of the case the plaintiff was entitled to a verdict.

The plaintiffs in error further submit that the verdict of the jury and the judgment of the District Court thereon, being rendered generally on the plaintiff's whole declaration, the several counts whereof are inconsistent, contradictory, and repugnant, and under instructions incorrect at least as to one count, are erroneous.

The judgment of the Circuit Court, being merely in affirmance of that of the District Court, is open to the same objections.

Argument.

A.

The principal question in the case is briefly this: —

Where the directors of an insolvent national bank have voted to go into liquidation, no receiver having been applied for or appointed, and the cashier of such bank deposits checks and drafts, in the ordinary course of business, with another bank, which has no notice of such insolvency or proposed liquidation; whether such deposit necessarily, and as matter of law, and regardless of any other possible evidence, is a fraudulent preference under the Revised Statutes?

The judge of the District Court ruled, in effect, that it is, and that no evidence whatever is competent to disprove an intent to prefer (Record, p. 19); from which of course it followed that the plaintiff was entitled to recover on the undisputed facts as above, no matter what other facts might be disputed or proved.

When the case came before Judge *Colt* in the Circuit Court, he admitted that, in order to invalidate a payment or transfer under the statute, there must be an intent to prefer, as well as an actual preference, coupled with a state or contemplation of insolvency (Record, p. 22); from which it ought to have followed, logically, that the case should go to a new trial, to let in evidence on the question of intent. But instead of coming to this conclusion, that learned judge proceeded to find a question of fact which was not before him on the writ of error, namely, that the undisputed facts showed that the act of the cashier could have no other result than to work a preference, and that from the fact of preference the intent to prefer must be presumed (Record, p. 22); and on this ground he affirmed the judgment.

The defendants (plaintiffs in error) submit that this ground is clearly untenable; for, once it is admitted that the intent is material, the question must be what intent is shown not only by the undisputed facts and inferences from them, but by all the facts in the case, dis-

puted or undisputed, as the jury may find them. As the Circuit Court had not before it all the facts (the bill of exceptions expressly reciting that there was other evidence not detailed in it, Record, p. 19), that Court could not properly undertake to decide the rights of the parties, so far as they depended on matters of fact; and its ruling can be sustained only on the theory that the intent to prefer is a conclusive presumption of law from the fact of preference, — a proposition which the Circuit Court probably did not mean to decide, for it is certainly not law, as we shall show hereafter.

The judgment of the District Court, then, can only be supported on the ground taken by that Court; and the question comes back to this, whether the rulings at the trial were right.

Let us first inquire what the law is, and then it will appear that the defendants (plaintiffs in error) have not had the benefit of it under the rulings of the District Court.

The whole case turns on the interpretation of a statute; for it is clear that apart from statute any creditor may obtain payment of a just debt by direct suit or by enforcing a lien or a set-off, or by any other legal means, regardless of the claims of other creditors.

The only statute bearing on this case is Rev. Sts. Sect. 5242, which is as follows: —

"All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either,

made after the commission of an act of insolvency, or in contemplation thereof,
made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another,

except in payment of its circulating notes, shall be utterly null and void."

The language of this Act is ambiguous; the possible constructions seem to be —

(1) That all payments whatsoever, made after the commission of an act of insolvency, are void; and so are likewise all payments made in contemplation of insolvency, and at the same time with intent to prefer.

(2) That all payments whatsoever made after the commission of an act of insolvency, or in contemplation thereof, are void; and so are likewise all payments made with intent to prefer.

(3) That those payments only are void where insolvency or contemplation thereof, and the intent to prefer, are combined.

The words of the Act may bear either one of these constructions. To consider them separately—

1.

The first construction defeats absolutely all payments made after the commission of an act of insolvency, irrespective of intent; and also all payments made in contemplation of insolvency, with intent to prefer.

For reasons presently to be stated, the plaintiffs in error do not take this to be the true construction; but, even if it is, the rulings of the District Court were wrong, because—

(*a*) There was no act of insolvency proved before the transactions in question took place. Even if insolvency was contemplated, that alone is not enough, on this construction of the statute, to avoid a payment made in good faith. There must be an *act of insolvency*, that is, a failure to redeem circulating notes.

Roberts vs. *Hill*, 23 Blatchf. 191; 23 Fed. Rep. 311.

An act of insolvency is not, as an act of bankruptcy is, defined by statute (Rev. Sts. Sects. 5014, 5021); but by analogy it must be a positive failure to pay debts, or an overt act of some sort. An intention, even an avowed intention, to become bankrupt or insolvent, is not *an act* of bankruptcy or insolvency.

The payment in this case was before any receiver had been appointed or even applied for; it was therefore not made after an act of insolvency, and was not, in the view we are now taking of the statute, void, unless shown to have been made with intent to prefer.

(*b*) The question of intent was not submitted to the jury, as we shall show that it ought to have been, so that the transaction was not brought within the statute, as done in contemplation of insolvency and with intent to prefer.

2.

The second construction suggested defeats absolutely all payments made either after an act of insolvency or in contemplation thereof, irrespective of intent; and likewise all payments made with intent to

prefer. On this view, the word *made*, where it is repeated in the statute, is equivalent to the word *or;* the statute describing (as it does by the former construction) several distinct classes of payments, either of which is void.

It is submitted that the statute cannot reasonably be read in this way. By such a reading the clause avoiding payments with intent to prefer becomes superfluous and meaningless; for there cannot possibly be a wrongful intent to prefer, unless where there exists a state of insolvency, actual or contemplated; and if it is already enacted that the mere existence of such a state shall suffice to avoid payments, it is senseless to enact further that they shall be avoided by an intent to prefer.*

This construction, however, seems to have been that adopted by the District Court. For that Court permitted the plaintiff to recover without showing any intent to prefer, or even if it had been affirmatively shown that there was no such intent. The learned judge below ruled broadly that after the passage of the vote by the directors of the Pacific Bank to go into liquidation, the cashier had no authority to make any such disposition of the checks and drafts received by him as to enable the defendant bank to apply them or their proceeds in payment of or as a set-off against the debt then due to it from the Pacific Bank.

Supposing that the cashier could have had no such power after the receiver had taken possession, or even after his appointment; supposing also that the defendants' good faith cannot help them, if the cashier of the Pacific Bank intended to prefer them, the defendants submit that the acts of the cashier, in the usual course of business, before any receiver was appointed, and before the secret act of bankruptcy committed by the directors of the Pacific Bank was known to the defendants, were not necessarily and as matter of law fraudulent and void. If they were not, i. under any possible circumstances they might be good, then the ruling cannot stand. If they were thus void, it must be because the statute peremptorily requires it; it must be because the Act of Congress defeats absolutely every deposit and payment made after the commission of an act of insolvency or in contemplation thereof, and does not permit the court or jury to consider whether there was any intent to prefer, whether the Comptroller afterwards

* The Stat. 1864, *c.* 106, § 52 (13 Sts. at Large 115), which is otherwise *verbatim* the same as Rev. Sts. Sect. 5242, has not this repetition of the word *made*, and clearly cannot bear the meaning now under discussion. The change in the revision was probably unintentional.

decided to appoint a receiver "after due examination" (Stat. 1876, *c.* 156, § 1, 19 Sts. at Large 63), or whether the receiver afterwards ratified the acts of the cashier; and excludes from consideration also any circumstances such as exist in this case showing that the deposit by the insolvent was in fact no payment at all, but on the contrary that the payment was the other way. The giving by the defendants in this case of their negotiable certificate immediately on the deposit, shows that the whole transaction was simply a cashing by them of the checks deposited, as much as if they had paid money for them; the certificate being given instead of money merely for the sake of convenience. It is only by neglecting this consideration that a perfectly lawful transaction can be converted into a fraud on the Act.

The Court will surely be slow to hold, unless the statute admits no other construction, that its effect is to establish so harsh a doctrine as an inflexible rule of law in all cases, to make the receiver's appointment relate back to the first secret act of insolvency, and to avoid acts of the insolvent done before such appointment to the same extent as if done after it. Yet this is the only construction which can sustain the ruling of the District Court.

3.

The construction for which the defendants (plaintiffs in error) contend is the third of those above stated; that is, that a payment is void under the statute, only if it is made after or in contemplation of insolvency, and made at the same time with intent to prefer; the statute having the same meaning as if the word *made*, where it is repeated, were replaced by the word *and;* describing only one kind of payment which is void, namely that in which the state or contemplation of insolvency and the intent to prefer concur.

This view of the statute is the same as that taken in

Case vs. *Citizens' Bank*, 2 Woods, 23.

Judge *Woods* in that case stated the law in these words (p. 25): "The transfer must have been made after the commission of an act of insolvency, or in contemplation of insolvency, and with a view to give a preference to one creditor over another, or with a view to prevent the application of the assets of the bank in the manner prescribed by the Currency Act."

The judge in that case then went on to find upon the evidence before him (the suit being in equity, and all questions of fact as well as of law being for the Court) "the commission of an act of insol-

vency by the Crescent City Bank, the insolvency of the bank, the transfer of notes, bonds, etc., and the preference of one creditor to another."

"These facts alone do not, however," the opinion proceeds, p. 27, "make the transfer void. It is necessary to the complainants' case to establish two additional facts: (1) that the transfer was made in contemplation of the insolvency of the Crescent City Bank, and (2) that it was made with a view to give a preference to the Citizens' Bank over other creditors, and to prevent the application of said assets in the manner provided by the Currency Act." The judge then, after discussing the evidence of contemplation of insolvency, and finding it clearly established, repeats once more (p. 30): "It remains to inquire whether the transfer of notes, etc., made to the Citizens' Bank, in contemplation of insolvency, was made with a view to the preference of one creditor over another." And it was only after determining this last question also in the affirmative that he decreed the transfer void.

Judge *Colt* in his opinion in the Circuit Court in this very case (Record, p. 22) assents to this view of the statute, which doubtless is the true one. It makes this statute resemble other bankrupt and insolvent laws as to fraudulent preferences, in requiring that an intent to prefer should be shown in order to defeat payment of a just debt. This element is wholly wanting in this case; in order to enable the plaintiff to recover, it should have been proved by him and found by the jury. The rulings of the District Court excluded this question from the consideration of the jury, and therein were erroneous. Those rulings amounted to saying either that the facts proved and admitted were conclusive evidence of intent, or that intent was not material. The opinion of the Circuit Court proceeded wholly on the former ground.

The defendants (plaintiffs in error) submit that neither position is tenable.

The mere fact that the actual result of the whole transaction was to give the defendants a preference, by enabling them to avail themselves of their set-off, is not sufficient, without showing also an intent to prefer, as was pointed out by *Woods* J., in *Case* vs. *Citizens' Bank*, *ubi supra*.

Whether an intent to prefer was proved was a mere question of fact, which it was no part of the province of the Court to decide; the evidence reported being far from conclusive, and at least capable of an interpretation favorable to the defendants (plaintiffs in error), as

may be shown by a little consideration of the facts admitted and proved.

It is true that the intent to prefer may be presumed from the fact of preference, but this is not a necessary inference. "It is said that a man must be supposed to intend the natural result of his act. But this remark, though often treated as an axiom, is by no means an infallible proposition. The result is not always evidence of the supposed intent."

Jones vs. *Howland*, 8 Met. 377, 386.

The presumption is one which may be rebutted; and enough appears to rebut it in this case.

(1) The transaction was in the regular daily course of business, as it had gone on for months (Record, p. 18). "A payment made with the view of giving a preference to a particular creditor is one rarely if ever made in the usual course of business. In such a case the creditor will usually be sought out by the debtor and payment made by an unusual transfer of assets . . . In the present case all the evidence tended to show that the payment was made in the usual course of dealing between the [Pacific] Bank and the defendant, and would have been made in the same way had the [Pacific] Bank been entirely solvent and its affairs prosperous. Such a payment cannot be said to have been made in contemplation of insolvency."

Dutcher vs. *Importers & Traders Bank*, 59 N. Y. 5, 11,

a case very like the present.

And in this connection, the uncontradicted evidence of the defendants' good faith (Record, p. 18) was material, and the District Court erred in holding otherwise. "A case may be supposed where a bank is hopelessly insolvent and is known to be so by its officers, and when any payment made by it will, as they know, necessarily result in a preference to the person receiving it; and yet if made in the ordinary course of business, as for instance to a customer who in ignorance of the condition of the bank continues his dealings and makes daily deposits, and draws out checks daily, it would be extremely inequitable to compel the latter to pay it back."

Roberts vs. *Hill*, 23 Blatchf. 312, 317; 24 Fed. Rep. 571, 574.

Is it equitable that the defendants should repay in full the money deposited by the Pacific Bank with them, and only get a dividend on

the money deposited by them with the Pacific Bank ten days before? (Record, p. 9, Exhibit D.)

If when the Pacific Bank accepted that deposit it was, to the knowledge of its officers, hopelessly insolvent, and liable to suspend payment at any moment (which is a question for the jury), accepting the deposit was a fraud on the Security Bank, such as entitles the latter to reclaim it in full.

Cragie vs. *Hadley*, 99 N. Y. 131.

Must the defendants give up what they have received in good faith, and lose besides what was obtained from them by fraud?

(2) Again, the cashier of the Pacific Bank did not show an intention to prefer the defendants, merely by depositing the checks with them; for what else was he to do with the checks? He had no other means of collecting them at once (which it was certainly his duty to do), as he dealt with the clearing-house only through the defendants. (Record, p. 18.)

(3) Another fact showing the *animus* of the transaction is that the Pacific Bank immediately drew a check for the amount and took the defendants' certificate of deposit, which would not have been done if the intention had been to make a preference to the Security Bank; the fact being that so far from intending a preference, they did not intend to leave the money in the hands of the Security Bank at all; their whole object being to cash their checks as soon as possible. (Record, p. 18.)

(4) And it is a very material circumstance that the certificate of deposit which the defendants held and now seek to set-off is a negotiable instrument (Exhibit D, Record, p. 9), and *non constat* that any officer of the Pacific Bank knew that it was still in the hands of the defendants at the time of the deposit of May 22. If they did not know it, they could have had no intent that the certificate should be available to the defendants as a set-off.

But whatever the evidence or the weight of evidence as to intent may have been, it was for the jury, and the judge erred in excluding it from their consideration.

"The question whether an intention to defeat the law and to prevent the due distribution of his assets existed in the mind of the trader in handing

over the portion of them in question to the creditor is one of fact for the jury. If the act was spontaneous on the part of the debtor, and there are no circumstances to rebut the presumption which arises from the act having been purely voluntary on his part, the jury should be told to infer that the preference thus given was fraudulent and wrongful. But if there are circumstances by which the presumption may be rebutted, those circumstances, whatever they may be, are for the consideration of the jury, and cannot properly be withdrawn from them."

Bills vs. *Smith*, 6 B. & S. 314, 321.

B.

Another objection arises on this record.

The rulings of the District Court were made, and the verdict and judgment rendered, on the plaintiff's declaration of three counts. The amended first count (Record, p. 9) seeks to rescind and set aside the transaction of May 22, and to recover back the money deposited, as an unlawful payment. It also seeks to recover on a special promise to pay the money; but this may be laid out of the case, as the judge expressly ruled any evidence concerning such promise to be immaterial, and refused to submit it to the jury (Record, p. 19). The second count (Record, p. 4) is on the certificate of deposit given by the defendants (plaintiffs in error); and the third count (Record, p 5) is for money had and received.

The first and second counts are inconsistent. The first treats the deposit as void; if it was, there is no consideration for the certificate, and no recovery can be had on that. But the second count seeks to recover on the certificate, thereby treating the deposit as valid, and affirming the transaction which the first count seeks to avoid. The receiver may treat a preference as void or as valid, but he cannot do both.

Smith vs. *Hodson*, 4 T. R. 211.
Butler vs. *Hildreth*, 5 Met. 49.
Snow vs. *Lang*, 2 Allen, 18.

On this record he has been allowed to do both; he has recovered a general verdict and judgment on his whole declaration. If he treated the deposit as void, relying on his first count, a judgment for him on that count only would be an adjudication that the defendants could not set off their claim in this action, but would leave them free to assert it in any other form.

If on the other hand the plaintiff relied on his second count, the defendants were clearly entitled in law to their set-off, if proved, as there could be no question of fraudulent payment, that count being based on the theory that the deposit was valid and a good consideration for the certificate; and a judgment for the plaintiff on that count would be an adjudication that the set-off was in fact disproved, and would bar the defendants from asserting the same claim not only in this action but in any other proceeding. They could not even get a dividend on it, in common with other creditors. So that there was error in not allowing the set-off or permitting the jury to pass upon it in considering this count. And the verdict and judgment being general, it is impossible to say that they were not rendered on this count, and the defendants may be estopped to set up in a future proceeding a claim which they have not been allowed to try in this.

It is familiar law that a general verdict on two counts, one of which is good and the other bad, must be set aside.

Grant vs. *Astle*, 2 Doug. 722, 730.
Empson vs. *Griffin*, 11 A. & E. 186.
York vs. *Pease*, 116 Mass. 482.

So as said by this Court, "If on any one issue error was committed, either in the admission of evidence or in the charge of the Court, the verdict cannot be upheld."

Maryland vs. *Baldwin*, 112 U. S. 490, 493.

On the same principle, in this case, as there was one count on which the plaintiff could not recover without allowing a set-off, and the set-off was disallowed as to the whole declaration, the general verdict is bad, whether or not the set-off might have been allowed against the other count. No amendment is possible, as the objection applies not only to the verdict but to the ruling of the judge directing it, and if an amendment could be made, it cannot be made by this Court, which has not the whole evidence before it, and cannot see that it applied to one count only.

If the plaintiff had amended at the trial by striking out one count, or if the judge had directed a verdict for him on one count only and for the defendants on the others, this objection might have been obviated; but as it is, the record, which ought to show either that the receiver has affirmed or that he has disaffirmed the transaction,

shows neither the one nor the other, or rather shows both. The entire verdict and judgment, rendered on several issues, the rulings on one of which at least were erroneous, are bad, and there must be a new trial.

JOHN C. COOMBS,
RUSSELL GRAY,

Of Counsel for Plaintiffs in error.

Office Supreme Court U. S.
FILED

Supreme Court of the United States.

No. 166. October Term, 1888.

In Error to the
CIRCUIT COURT OF THE UNITED STATES
For the District of Massachusetts.

NATIONAL SECURITY BANK,

PLAINTIFFS IN ERROR,

vs.

BUTLER, Receiver,

DEFENDANT IN ERROR.

SUPPLEMENTAL
BRIEF FOR THE PLAINTIFFS IN ERROR.

J. C. COOMBS, } Of Counsel for
RUSSELL GRAY, } Plaintiffs in Error.

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NATIONAL SECURITY BANK

VS.

BUTLER, RECEIVER.

SUPPLEMENTAL BRIEF FOR PLAINTIFFS IN ERROR.

In a foot-note to the 8th page of our original brief we say: "The Stat. 1864, c. 106, s. 52 (13 Sts. at Large, 115), which is otherwise *verbatim* the same as Rev. Sts. Sect. 5242, has not this repetition of the word *made*, and clearly cannot bear the meaning under discussion. The change in the revision was probably unintentional."

Further reflection upon this discloses a fourth possible and perhaps probable construction of the act, and leads the plaintiffs in error to submit that if the introduction of the word "made" therein mentioned was not immaterial, then in purpose and effect it alone, as a participial adjective, modifies each of the substantive acts that constitute the compound subject of the sentence, and reduces the first "made" to a modifier of the "payment of money to either."

DISCUSSION.

(*a*) This is certainly the usual grammatical construction. 1st, It is consistent with the punctuation; and, 2d, the repetition of the word "made" without a connective, disjunctive, or conjunctive, is unusual even in ordinary language to import alternative or conjunctive modifiers of the same scope and degree, and implies that the word as first used modifies only the substantive act in the division in which it is found.

(*b*) It will be noticed that the act, however construed, nowhere forbids the payment of money generally, even after an act of insolvency, or otherwise except to shareholders or creditors; and the chapter contemplates the distribution of the assets of a bank by voluntary liquidation, though not insolvent.

(*c*) The act expressly prohibits conduct which shall subject the bank to the winding-up process of chapter five, including some acts

which are not necessarily acts of insolvency, and which, though unlawful for the bank, are nevertheless sustained for the benefit of a third party dealing with the bank. S. 5208.

(*d*) Sect. 5239 of chapter five itself contemplates that the provisions of the act may be violated by acts which are not void but effective, and holds the directors personally liable for all damage thus sustained.

(*e*) The defendant in error must give the same force to all of the section from and including the second "made" as that required by this reading, if that word is to be preceded by "or," as he contends. In addition to this, he must find reasonable scope for the independent operation of the first "made" upon all the preceding substantive divisions of the subject.

(*f*) That is, he must construe the section to declare that the second substantive act, deposits to the credit of the bank, are void after an act of insolvency or in contemplation thereof, though not intended to prevent the designed application of the assets, or to prefer. This is without reason.

(*g*) If anything can be an act of insolvency except default in paying circulating notes, it should be voluntary liquidation; but, if so, such construction of the act would defeat all voluntary liquidation.

(*h*) It would literally prohibit payments of dividends by the Comptroller.

(*i*) Indeed, the chapter does not contemplate that a bank shall cease to do business upon committing even the single act of insolvency it describes, to wit,—a failure to redeem its circulating notes,—but only after notice thereof to it by the Comptroller (Rev. Stat. s. 5228), to the end that the bank may contest the question in a trial to be had thereon. S. 5237.

A bank's credit is its life. To interrupt its business arbitrarily is to destroy it.

(*j*) And after a bank's right to do business, except in liquidation, has ceased, it has necessarily the power to transfer the title to commercial paper:

Richmond vs. *Irons*, 121 U. S. 28–59, 60

which is the act of the cashier sought to be impeached in the case at bar. Indeed the transfer of assets directly to creditors after they know the bank to be insolvent was in the case cited sustained.

(*k*) The Comptroller may refuse to appoint a receiver, even though the bank be insolvent and transferring assets to creditors in voluntary liquidation.

Richmond vs. *Irons*, 121 U. S. 27.

(*l*) The amendment of June 30, 1876, expressly recognizes the right to voluntary liquidation of insolvent banks; that is, to distribute its assets after insolvency, if not with a view to prevent, etc., or prefer.

The plaintiffs in error suggest the following additional considerations and authorities.

I.

All systems of bankruptcy attempt, as does this act, to avoid transfers after an act of insolvency, or in contemplation thereof, if made with a view to prevent, etc., or prefer, but not otherwise.

II.

All systems of bankruptcy preserve the right of set-off.

In the last bankrupt act of the United States it is stated broadly as follows: "In all cases of mutual debts or mutual credits between the parties the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed or paid; but no set-off shall be allowed for a claim in its nature not provable against the estate: provided that no set-off shall be allowed in favor of any debtor to the bankrupt for claims purchased by or transferred to him after the filing of the petition."

Of this section, in *Sawyer* vs. *Hoag*, 17 Wall. 610, *Miller J.*, said: "This section was not intended to enlarge the doctrine of set-off, or to enable a party to make a set-off in cases where the principle of legal or equitable set-off did not previously authorize it."

The extent to which set-off was carried under the act referred to is familiar. The idea of set-off is inconsistent with the idea of a misapplication of assets or a preference, and it would be hopeless to look for a case in which the act impeached as a preference was the acquisition of a negotiable claim in behalf of the insolvent, against a solvent person, for a full value of the assets conveyed.

In Massachusetts the plaintiff was not allowed to amend even by dropping out an independent cause of action, if it would defeat a defendant's right to set-off.

Dodge vs. *Tileston*, 12 Pick. 328.

Says Shaw, C. J., "The right of set-off accrues at the time of the first publication; the property which the assignee takes by the assignment is that which the debtor could then assign."

Demmon vs. *Boylston Bank*, 5 Cush. 194–7.

Under the United States Bankrupt Act of 1867 the right accrued on the filing of the petition. But a banker could continue the collection of drafts deposited with him before, and apply in payment of his claim after, the commencement of proceedings.

In re *Farnsworth*, 14 B. R. 148.

Under the English Bankrupt law he can do so, although his power to sell or to collect was revocable by the bankrupt.

Ex parte *Whiting*—Re *Dow*, 2 Lowell, 478, in which the English law is considered.

To rule that an innocent transaction is a preference because it results in a set-off, is to invert the syllogism, and impeach the law and not the act.

"This deposit, though it operates as security and as payment, was not intended for either, but is made so by the bankruptcy of the debtor."

"A set-off created by law to prevent injustice does not stand on the footing of contract. The money or credit belongs to the assignee for the use of the general creditors; but the law says he shall not recover it in full and turn the particular creditor over to a dividend. This leaves the appropriation, not to the actual or presumed intent of the parties, for there is none, but to the operation of the law of mutual credit.

Ex parte *Howard Natl. Bank.*—Re *North & Co.*, 2 Low. pp. 488, 489.

Under the bank act the rights of the bank become fixed at the time of the appointment of the receiver.

Balch vs. *Wilson*, 25 Minn. 299.

"A right of set-off, perfect and available against the bank at the time of his appointment as receiver, is not affected by the bank's insolvency: he succeeds only to the rights of the bank existing at the time it goes into liquidation."

Boynton J., in *Hyde* vs. *McVay*, 31 O. St. p. 288.
Platt. vs. *Bentley*, 11 A. L. Reg. N. S. 171.

III.

No system impeaches transfers for present adequate consideration Negotiable paper given for a debt extinguishes or merges it in the new obligation. Certificates of deposit are equivalent to money.

Shute vs. *Pacific Nat'l Bank*, 136 Mass. 487.

Such instruments are designed to be transferred, and then are not subject to set-off or equitable defences against the payee.—*Ibid.*

The deposit of the insolvent's bills receivable for such a certificate is in no true sense a transfer of its assets.

The defendant in error avails himself of his remedy herein at his option. He might have transferred his certificate before demand. Electing to sue upon it himself, he gives us the same right to set-off which he would claim were the Security Bank to make a worse failure than the Pacific.

To rule that the natural consequence of the transaction sought to be impeached was a preference, and, therefore, to be conclusively presumed intentional, is, in view of the negotiable certificate given at the time, as unreasonable in law as the inference was obviously untrue in fact.

IV.

It is said that knowledge on the part of the Security Bank of a condition or intention on the part of the Pacific Bank is not essential to defeat a recovery back.

This would be contrary to the provisions of the last United States bankrupt act, and of the insolvent laws of Massachusetts.

They made preferences and misapplication causes to put the debtor into insolvency, but required knowledge or notice on the part of the party benefited to enable the assignee to recover back.

V.

The United States Bank Act is a device by which, in consideration of the purchase and pledge of its bonds by a bank, it guarantees the bank's circulating notes; and to cover any deficiency in the sale of that security for its indemnity, claims a preference in and paramount lien over all the present and after-acquired property of the bank. The act is a contract with the banks as well as a law; and it expressly provides for winding up the bank when it does any act in

excess or violation of its authority, but at least in some such cases preserves the rights of the parties who have dealt with it innocently. Ss. 5239, 5208.

The United States might well, therefore, for its own protection, declare all acts void that could defeat its indemnity.

National Bank vs. *Colby*, 21 Wall. 609.

VI.

And, finally, though the consummation of the act complained of was not a preference, yet if it were this law does not declare that upon any contingency whatever all creditors shall share equally, as it might have done, but proceeds to declare certain acts void. There is as much reason to claim that it intends a preference arising out of acts which it does not prohibit with that view, as that it intends to prevent them when not attainable except in the violation of some prohibition.

In re *City Bank*, etc., 6 B. R. 71.

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Of Counsel for Plaintiff in error.

Office Supreme Court U. S.
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CLERK

Supreme Court of the United States.

No. 166.

THE NATIONAL SECURITY BANK, P. E.,

v.

PETER BUTLER, RECEIVER.

BRIEF OF THE DEFENDANT IN ERROR.

GENERAL STATEMENT.

The only question made at the trial was whether the plaintiffs in error had a right to set off the $10,000 certificate of deposit, dated May 13, 1882, and held by them on May 22, 1882, when the receiver was appointed.

It does not appear in the record, but will not be denied by the other side, that the said $10,000 certificate of deposit was given for the balance of an old and a larger certificate, held Nov. 18, 1881, when the bank first failed, and a portion of which was paid. The fact is not material now. It is enough for the purposes of the case at bar that the same constituted a pre-existing debt on May 20, 1882.

The Pacific National Bank was deeply insolvent on May 20, 1882. The directors, at the close of business on that day, voted that the bank go into liquidation, that the bank be closed to business, and selected a committee, consisting of three of their own number and William J. Best, an outsider, to proceed to Washington, to confer with the Comptroller of the Currency and to recommend that the cashier, Mr. Whitney, be appointed receiver. The committte selected reached Washington the same night; and on Monday morning, at about ten o'clock, Mr. Price was appointed receiver. The bank did not open again for business, and did no more business, because of the said vote and facts. But the cashier, Mr. Whitney,

who was left in charge of the assets, and was to be recommended for the office of the receiver, took sundry checks and drafts, amounting to $10,967.95, that came in by mail on Monday morning, and sent them by a messenger to be deposited with the Security National Bank, with a check drawn for the aggregate sum of same, with the balance of said deposit account of $40.25 added, and took therefor a negotiable certificate of deposit for $11,008.20. Mr. Whitney had signed, as cashier, the $10,000 certificate of deposit of May 13, 1882, held by the Security Bank, and of course knew of the same. The plaintiff in error has not stated in the bill of exceptions, and the record does not show, what the "other evidence" given in the case in respect to what the two cashiers agreed as to how the funds should be held was, and which the court ruled to be immaterial. So this court cannot regard the same, and determine whether it was material or not. This evidence related, in fact, to what occurred between the cashiers after the receiver had been actually appointed.

ARGUMENT.

I.

"It is the settled law of this court that, when the evidence given at the trial, with all inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict." Gray, J., in Randall *v.* B. & Ohio Railroad Co., 109 U. S. 478, 482.

II.

As to ruling of Judge Nelson (Rec., p. 19).

That there were acts of insolvency, and in contemplation of actual insolvency proceedings, under the Banking Act and within the provisions of R. S., § 5242, before the transaction in dispute, does not admit of serious controversy. The exception to the ruling of the court below on that point, assigned as error, seems to be frivolous.

National Bank *v.* Colby, 21 Wall. 609.
Raynor *v.* Pac. Nat. Bank, 49 Superior Ct. N. Y. 119; s. c. 93 N. Y. 37.
Irons *v.* Manf. Nat. Bank, 6 Bissell, 301.
Market Nat. Bank *v.* Pac. Nat. Bank, 30 Hun, 50.
Robinson *v.* Nat. Bank, 81 N. Y. 385.
In re Manf. Nat. Bank, 5 Bissell, 499.
Case *v.* Citizens' Nat. Bank, 2 Woods, 23.
Richmond v. Irons 121 US 28

It is clear that the cashier had no authority to make any such disposition of the checks and drafts as to enable the National Security Bank to apply them or the proceeds thereof in payment of or as a set-off against the prior debt then due it from the Pacific National Bank. The lien of the United States, first to secure the government, and second to secure the assets of the bank for ratable distribution among its general creditors, had attached, and could not be defeated by any act of the cashier in question.

The policy of the law and the true doctrine are set forth, in the opinion of this court, Field, J., in National Bank *v.* Colby, *supra;*

and in Harvey *v.* Allen, Blatchford, J., 16 Blatchford, 29; Venango National Bank *v.* Taylor, 56 Pa. St. 13.

There may be no express provision of statute, making the title of the receiver relate back to the date of the declared insolvency; but such is the virtual operation of the Banking Act. As said in substance in the case last cited above (p. 17), the difficulty with the claim is found in the prohibition of any transfer or disposition of the assets until after a receiver has been appointed, coupled with the manifest purpose for which prohibition was made. The bank's property was placed by what was done on May 20, 1882, under the immediate potential control of the government.

When it closed its doors to business, with insolvency declared, awaiting the appointment of a receiver, the right to use the corporate funds for business expired.

"A corporation which has voluntarily ceased to carry on business, or whose right to use the corporate funds for business purposes has expired, continues to hold its assets subject to the equitable claims of its creditors. . . . The powers of management vested in the directors of an insolvent corporation which has ceased to carry on business are solely powers to manage the assets in trust for their benefit."

2 Morawetz on P. Corp., § 787.

Milligan, J., in Marr *v.* Bank, 4 Coldw. 471, 484, says: "By the insolvency of the bank, the corporation is rendered incapable of pursuing the objects for which it was created without defrauding the public and the existing creditors. Its officers or agents properly ceased to use its franchises after the insolvency was ascertained, but their responsibility as to the assets did not cease. They continued to hold them as before,— not for themselves or for the use and benefit of the stockholders, but for the creditors of the corporation. . . . In equity, as well as in law, the beneficial interest therein belongs to the creditors."

See also Wood *v.* Dummer, 3 Mason, 308, 311.

Richmond *v.* Irons 121 U.S. 28.

The vote of the directors of May 20, 1882, terminated the power of the cashier to do business, he being appointed by the directors and being their agent, subject to their control.

Harrington *v.* Bk., 1 Thomp. & C. 361.

Brown *v.* Adams, 5 Biss. 181.

The vote was presumably recorded by the cashier. (It was, in fact, although the record does not so show.) At any rate, his knowledge of the vote and of the condition of the bank would be presumed. The vote so states. The bank did not open for business Monday morning. He knew this, of course, and must be assumed to know the reason why.

III.

If the verdict is not sustained on the specific ground stated by Nelson, J., then it will stand because the transaction comes within the prohibition contained in R. S., § 5242.

His honor, Judge Colt, in his opinion (Rec., p. 22) covers this point fully: "The undisputed facts here show that the act of the cashier, under the circumstances, could have no other result, if allowed to stand, than to operate as a preference in favor of the defendant bank. The Pacific Bank had decided to close its doors and go into liquidation; and, after this, the necessary consequence of the transfer was to create a preference. It cannot be said that the transfer was made with the intention of going on in business. Jones *v.* Howland, 8 Met. 377. Nor can it be contended that it was made to save the credit of the bank, as was claimed in Case *v.* Citizens' Bank. A person is presumed to intend the necessary consequences of his own acts; and, after the vote of the directors to close the bank and go into liquidation, any transfer of the assets of the bank to a creditor, whereby that creditor secures a preference, must be presumed to be made with an intent to prefer. *In re* Silverman, 4 B. R. 523; Saw. 410; Sawyer *v.* Turpin, 2 Low, 29, 33."

Where the natural and inevitable effect of the transaction is in contravention of the statute, the intention is found as matter of course as a conclusive presumption; and the court would not allow a verdict to the contrary to stand.

Case *v.* Woods, *supra.*
Watson *v.* Taylor, 21 Wall. 378.
Forbes *v.* Howe, 102 Mass. 427.

Unlike the last bankruptcy act and the usual insolvency laws of the States, but like the bankruptcy act of 1841, R. S., § 5242, the Banking Act makes the transfer or payment prohibited absolutely void, irrespective of the question as to whether the transferee knew

or had reason to believe that the bank was insolvent or in contemplation of insolvency.

Peckham *v.* Burroughs, 3 Story, 544.
Case *v.* Cit. Nat. Bank, 2 Woods, 23.
See Roberts *v.* Hill, 24 Fed. Rep. 371.

This is not a case like Casey *v.* La Société, etc., 2 Woods, 77, as the bank got no equivalent nor any value whatever for the funds delivered.

IV.

Creating a subject of set-off is equivalent in legal effect to making a direct payment.

It must be conceded that Mr. Whitney as cashier could not have legally paid the debt of the plaintiff in error on Monday morning. If he had done so, the receiver could have recovered the money so paid. What he could not do directly could not be done indirectly, by creating a subject of set-off. The question here is whether the court will allow the set-off, and apply the same as a payment in law, when the law prohibited the parties from doing it.

The court, in Venango Nat. Bk. *v.* Taylor, 56 Pa. St., declined to do such a thing. In that case, a debtor of a failed bank endeavored to obtain and get a subject of set-off by buying and taking an assignment of a claim held by a depositor against the bank. The court denied the right of set-off, with some wholesome doctrines of law and equity enunciated, which apply to the case at bar, the substance of which is stated above.

V.

The assets became emphatically trust-funds held by the bank for the benefit of the creditors on May 20, 1882, upon the passing of the vote of that date, and no set-off will be allowed.

The theory of a set-off is that personal debts are only set off to each other or compensated the one by the other by operation of law, when they are of the same personal character. (Field, J., in Beauregard *v.* Case, 91 U. S. 134, 141.) When the law or the policy of the law is against it, a set-off will not be allowed. Where the

funds sought to be recovered constitute a trust-fund pledged to the general creditors for general distribution, a set-off is not allowed. (Sawyer *v.* Hoag, 17 Wall. 610; Scammon *v.* Kimball, 92 U. S. 362; Scoville *v.* Thayer, 105 *id.* 143.) At any rate, the mutual debts sought to be set off to each other must exist at the time when bankruptcy occurs. In the case at bar, that occurred on Saturday, May 20, 1882, the right of the plaintiff in error became then fixed, as being only the right to prove the existing debt, and share ratably with the other general creditors in the distribution of the assets to be made in course of the liquidation then voted. It was held in Osborn *v.* Byrne, 43 Conn. 155, that a depositor could not set off his deposit against his debt to the bank. However this may be, it is contended here that the property of the bank on Saturday, May 20, 1882, was required thereafter to be held and treated as trust property for the payment of the debts of the association in a *pro rata* distribution; and the receiver can pursue it into whosever possession it was transferred, unless, certainly, he was a *bona fide* purchaser for value. The Security Bank must be held as bailee or trustee.

Marr *v.* Bank, 4 Coldw. 472.
Libby *v.* Hopkins, 104 U. S. 303.

The right of set-off rests on no special act of Congress, but on established legal and equitable principles. It is effected by judicial action. As said by Miller, J., in Blount *v.* Windley, 95 U. S. 179, "Set-off is the doctrine of bringing into the presence of each other the obligations of A to B and of B to A, and by the judicial action of the court make each obligation extinguish the other." The relation must be one of strict legal and mutual credits to allow of a set-off. If one of the obligations is a trust, or in the nature of a trust, where the rights of third persons, like creditors, are involved, and would be defeated by the application, a set-off will not be allowed.

What was done in drawing a check for all the funds, including the item of $40.25, and taking a certificate of deposit, has the appearance of a deliberate design to create a set-off.

Traders' Bk. *v.* Campbell, 14 Wall. 97.

The court could not, therefore, in any view of the case, have sustained a verdict, if rendered for the plaintiff in error.

VI.

As to verdict and judgment.

The error assigned, that the verdict was ordered generally, and not on any particular count, calls for no serious argument. No objection was made to the declaration by way of demurrer or otherwise at the trial, and no ruling on the subject appears by the record to have been asked for, or made the subject of an exception. It is too late to raise any such objection after verdict and judgment, if there was any ground for it originally, which we deny. (R. S., § 954; Roach *v.* Hullings, 16 Pet. 319.) A general verdict cured all defects in matters of form, if there were any.

The bill of exceptions states that all of the counts were for the same cause of action, as they are in substance and effect. The different counts only allege the same cause of action in different forms, and either would sustain the judgment. The practice and law of the State court governs. (R. S., § 914.)

There being no motion or order that the plaintiff elect on which count he would proceed, there was no error.

May *v.* Tel. Co., 112 Mass. 90.
Mulloday *v.* Holden, 123 Mass. 583.

By the common law, the misjoinder of separate and distinct causes of action might be taken advantage of either by demurrer or by motion in arrest of judgment. Under the statutes of Massachusetts, it can be done by demurrer only.

Barlow *v.* Leavitt, 12 Cush. 483.
Commonwealth *v.* Dracut, 8 Gray, 455.
Clay *v.* Barlow, 123 Mass. 378.

We insist that the objection made is of a peculiarly technical character and of no force at that. If either count will support the verdict, that is enough. Each being stated in the bill of exceptions as being for one and the same cause of action and being good in itself, there was no need of selecting one of them for verdict and judgment.

A. A. RANNEY.

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A. A. RANNEY.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1883.

No. 166.

SECURITY NATIONAL BANK *vs.* BUTLER.

DEFENDANT'S SUPPLEMENTARY BRIEF

A. A. RANNEY.

JUDD & DETWEILER, PRINTERS.

IN THE

Supreme Court of the United States.

No. 166.

SECURITY NATIONAL BANK *vs.* BUTLER.

DEFENDANT'S SUPPLEMENTARY BRIEF.

I.

In view of what the plaintiff insists upon in its two briefs we refer to the following additional authorities:

Labor *vs.* Cooper, 7 Wall., 510; Matthewson *vs.* Grant, 2 How., 263; Park *vs.* Turner, 12 *id.*

If there had been a motion in arrest of judgment the verdict could have been amended, if need be.

Maryland *vs.* Baldwin, 112 U. S., relied on adversely, related to error in the charge and to the admission of evidence, and is not applicable.

In York *vs.* Pease, 116 Mass., there was a demurrer.

There was no inconsistency between the second count and the others. The set-off could not be allowed on that count more than on the other. The certificate of deposit was only an express voucher for a promise, which the law would otherwise have implied, for the payment of the money real-

ized from the checks and drafts deposited in fraud of the creditors. Suing on it did not waive the fraud and justify the set-off as matter of law. The receiver had no power thus to destroy the rights of the creditors, as his authority was merely administrative of a trust imposed by law, with no power even to compromise claims without the leave of the Court and the Comptroller of the Currency.

II.

As to Trust Character of the Funds.

In Cook County National Bank *vs.* United States, 107 U. S., 452, the Court say "that courts of law and courts of equity will not allow an application of funds in set-off so long as they are effected with a trust." That the Government had a first and paramount lien on the assets of the bank which held them as against any act of the cashier, after the commission of the acts of insolvency on Saturday, May 20, and the initiation then of insolvency proceedings, which held all the property for the purposes of the trust imposed upon the officers of the Government, as in *gremio legis*, for the security of the Government, and then for ratable distribution among the creditors, as much as the bonds deposited to secure the circulation, seems to be too clear for argument. The other counsel do not meet this point in their brief. It is demonstrated in the cases found in the original brief, especially in

National Bank *vs.* Colby.

Harvey *vs.* Allen.

Venango National Bank *vs.* Taylor.

That the receiver could follow and recover the funds, as still effected with the trust, seems likewise clear.

Nat. Bank *vs.* Ins Co., 104 U. S.

This point is not touched by the opposide counsel in their brief. How the Court can apply the set-off as payment in law, when the parties could not do it themselves, is not shown on principle or by authority, especially with the trust character of the funds and debt sued for.

III.

The defendant does not propose to follow the plaintiff's counsel in their efforts to construe R. S., § 5242. It is a species of over-refining and of what may be called with becoming respect hypercriticism. It betokens an attempt at a higher wisdom than that which any court has heretofore conceived in dealing with this subject.

The design of the statute is clear. Its aim was to secure the lien of the Government after acts of insolvency and a contemplation of insolvency had occurred. It expressly forbids after that, among other things, all deposits of money, bullion, or other valuable things for its use or for the use of any of its stockholders or creditors," calculated to defeat the lien or to operate as a preference, whether the depositor knew of the facts or not.

The ease with which such a thing could be done by a bank, with its correspondents, or those with whom it had accounts, and the difficulty, or impossibility, in the way of proving notice, were foreseen, and an absolute prohibition was made, with a provision that the transaction should be absolutely null and void, depending only on the acts of the insolvent bank, and requiring no participation on the part of the other party. The payee or transferee need not know of the acts of insolvency or of the contemplation of the same, or of the purpose of the transfer or deposit made, certainly if he pays no value for them.

The court is not to import into the scheme of insolvency contained in the banking act the actual provisions to the contrary found in the insolvency laws of the State of Massachusetts or in the general bankruptcy act of 1867, which was repealed before the time in question. The omission was by manifest design. The bankrupt act of 1841, construed by Judge Story in Packham *vs.* Burroughs, 3 Story, did not contain this provision, and the banking act followed that in the respect in question. (Case *vs.* Bank, 2 Woods.) The general bankruptcy acts of 1867 did not apply to national banks and did not affect the banking act. (*In re* Man'f. Nat. B'k, 5 Bissell, 499.)

It will be seen as a significant fact that the banking act did not, like the said insolvent and the bankruptcy laws, preclude a creditor who had received an unlawful preference from proving his claim, even in cases where he had been cognizant of and a party to an illegal transaction. Such a provision would have been unjust if notice was not required or had in fact.

It was thought best, for presumably wise reasons, to shut down the gate absolutely upon all business of the kind, after insolvency occurred, and compel liquidation with a *pro rata* distribution of the assets, which were constructively from that moment to be enfolded by the legal arms of the Government if need be to carry out the policy of the law.

The view with which the thing complained of was done, may be in some cases an open question, as it was made in Roberts *vs.* Hill, 23d Fed. Rep., and same case in 24th *id.* So in Dutcher *vs.* Bk., 59 N. Y., 5, 11, and recognized by Colt, J., in the case below.

Where a bank continues in business, receiving and paying

money over the counter, and customers may be misled, the law may be a hardship, and other elements of estoppel, &c., may come in. The bank may be getting an equivalent, as in Casey *vs.* La Société, &c., 2 Woods, 77. But where the bank is deeply and hopelessly insolvent, and known by the board of directors to be so, with a formal vote so declaring, with proceedings closing the doors to business, and indicating a process of voluntary or involuntary liquidation, which were consummated directly, as soon as might be, the view and effect of the subsequent transaction is clear and is fixed as matter of law. It is brought manifestly within the statute prohibition, and no intent of the cashier, the agent, or instrument by which the thing is done can relieve the act of its illegality. His act was either unauthorized and void for that reason, or the act of the bank with its knowledge and presumed view governing it. It makes no difference if the cashier acted from mistake, thoughtlessness, or inadvertence, and was personally innocent of all intended wrong, the illegal effect of the act is inevitable, and the court will not consummate it by allowing a set-off which will alone do the mischief.

In Craigie *v.* Hadley, 99 N. Y., 131, a depositor who had made deposits after insolvency had occurred, and which had been received by the bank with knowledge of its insolvency not disclosed, was allowed to recover from the receiver, when appointed subsequently, the money deposited, because of the fraud thus practised. *A fortiori*, the receiver should be allowed to recover funds transferred by the bank in fraud of the creditors.

In Richmond *vs.* Irons, 121 U. S., a director who transferred his stock, after knowledge of the insolvency of the

bank, but before the commencement of insolvency proceedings, was held to have committed a fraud upon the creditors and the transfer was found to be void as against them. So a transfer of a part of the funds of the bank after insolvency was ascertained and declared by the board of directors, with insolvency proceedings begun and the doors closed to business, creating adverse claims by way of set-off or otherwise, was a more egregious fraud upon the Government and the creditors and is void, and the money can be recovered with a disallowance of the alleged set-off. The Court will not give effect to and consummate such an illegality and fraud where anything remains to be done to that end, and that thing, if done, must be done by the Court in a suit.

It is immaterial whether Judge Nelson or Judge Colt has given the right reasons in their rulings, if for any reason the set-off cannot be allowed as a matter of law on the facts appearing, with all inferences which the jury would have been justified in drawing therefrom. The only ruling proper to be excepted to is that the jury would have no right to allow the $10,000 certificate of deposit in set-off.

We regard the exceptions all as frivolous and as justifying the allowance of damages by double costs and interest, because of the long delay and expense of this protracted litigation. We feel bound in the discharge of our duty to move for them.

A. A. RANNEY.